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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1946**

## No. 593

FRANCIS R. COPE, JR., PETITIONER,

*vs.*

A. M. ANDERSON, RECEIVER OF THE NATIONAL BANK OF KENTUCKY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

**PETITION FOR CERTIORARI FILED OCTOBER 10, 1946.**

**CERTIORARI GRANTED DECEMBER 9, 1946.**

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# Appendix

## RELEVANT DOCKET ENTRIES.

1937

Feb. 18. Bill of Complaint, filed.

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Feb. 19. Amended and supplemental bill filed.

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Mar. 11. Motion to dismiss bill by Girard Trust Co., Trustee et al, filed.

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Mar. 13. Appearance of MacCoy, Brittain, Evans & Lewis, Esqs. for Mrs. E. S. Cope, filed.

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Mar. 13. Special appearance of MacCoy, Brittain, Evans & Lewis, Esqs. for F. R. Cope, Jr., filed.

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Mar. 19. Answer of Hazel Berger & Mary E. Seaman, filed.

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Mar. 22. Motion by Fidelity-Phila. Trust Co. trustee u/w Blanche E. Neide, dec'd to dismiss bill, filed.

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Mar. 23. Answer of Robert D. Christie, Exr. etc. filed.

Mar. 24. Motion by A. Irvin Voss, et al, to dismiss bill, filed.

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April 1. Answer of Stewart Morgan, filed.

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May 18. Stipulation of counsel substituting Trustee of B. E. Neide, deceased, as party defendant, filed.

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1944

Aug. 28. Motion of Girard Trust Co., Trustee et al to dismiss bill, filed.

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*Relevant Docket Entries*

Aug. 28. Motion of Steere & Co. to dismiss bill, filed.

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1945

Mar. 27. Appearance of MacCoy, Brittain, Evans & Lewis, Esqs. for Francis R. Cope, Jr., filed.

• • • • • • • • • • •

May 8. Plaintiffs motion for summary judgment, filed.

Aug. 3. Opinion, Bard, J., dismissing action, filed.

Aug. 3. Judgment dismissing action, filed. 8-4-45 Noted & Notice mailed.

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Aug. 29. Petition of plaintiff for rehearing sur motions to dismiss, filed.

Sept. 11. Order of Court denying petition for rehearing, filed 9-12-45 noted & notice mailed.

Sept. 11. Order of Court denying motion to suspend judgment filed. 9-12-45 noted.

Oct. 30. Plaintiff's notice of appeal, filed. 10-31-45 copies to Harold Evans; John Wintersteen; Arthur Littleton; F. H. Spotts; Thomas Stokes; Chas. M. Donley; Jas. D. Harlan; Chas. H. Weidner; & Morris H. Fussell.

Oct. 30. Copy of Clerk's notice to U. S. Circuit Court of Appeals, filed.

Oct. 30. Appellant's designation of contents of record on appeal, filed.

Oct. 30. Appellant's statement of points on which he intends to rely, filed.

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Nov. 15. Order of Court amending opinion filed Aug. 3, 1945 filed 11-16-45 noted.

Dec. 6. Order of Court extending time for filing record on appeal to Jan. 7, 1946, filed.

## COUNSEL OF RECORD.

Robert S. Marx, Esq., and Harry Kasfir, Esq., of Nichols, Wood, Marx & Ginter, Esqs. (Cincinnati, Ohio), John Garaguso, Esq., Vincent C. Veldorale, Esq., Joseph Marinelli, Esq., for A. M. Anderson, Receiver.

Arthur Littleton, Esq., for C. N. Davis, Fidelity-Philadelphia Trust (Est. C. W. Poultney); Fidelity-Philadelphia Trust Agent for Spencer and Rebecca B. W. Spencer; Fidelity-Philadelphia Trust Company, Trustee, Estate Neide, Charles N. Davis.

David J. Smyth, Esq., for Chas. Roland.

Thos. Stokes, Esq., and Frederick H. Spotts, Esq., for A. I. Voss and Lena Schmidte.

Wintersteen, McCoy & Wintersteen, Esqs., for Girard Trust Company, Trustee, et al.

MacCoy, Brittain, Evans & Lewis, Esqs., for R. S. Holland, L. B. Holland, Mrs. L. A. Holland, Girard Trust Co., Trustee C. Cope; Mrs. E. S. Cope, Francis R. Cope, Jr., and Steere & Co.

David I. Scanlon, Esq., for J. J. Tunney.

M. L. Casman, Esq., for Elsa N. B. Pridgen.

John Arthur Brown, Esq., and Jos. J. Brown, Esq., for Nellie S. Brooks.

Harold R. McCown, Esq., for C. S. McCown.

H. Lawton Russell, Esq., for H. Berger and M. E. Seaman.

Chas. H. Weidner, Esq., for Stewart Morgan.

Ballard, Spahr, Andrews & Ingersoll, Esq., for Girard Trust Company, Trustee, Estates Jane G. G. Childers and J. L. Glenn; and for Gottlieb Grauf.

## BILL OF COMPLAINT.

### I.

The National Bank of Kentucky is a national banking association organized under the laws of the United States, commonly known as the National Bank Act, and is domiciled at Louisville, Jefferson County, in the Western District of Kentucky.

### II.

Said Bank was closed by resolution of its Board of Directors on the 16th day of November, 1930.

### III.

Thereafter on November 17, 1930, the Comptroller of the Currency of the United States, being satisfied from information on file in his bureau, that said National Bank of Kentucky, located in the City of Louisville, County of Jefferson and State of Kentucky, was insolvent and unable to pay its just and legal debts, and in pursuance of the power and authority vested in him by law and under the provisions of Section 1 of the Acts of Congress,—"An act authorizing the appointment of receivers for national banks and other purposes," approved June 30, 1876, appointed Paul C. Keyes Receiver of said National Bank of Kentucky with all the powers, duties and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a receiver. Said Paul C. Keyes thereupon duly qualified and entered upon the duties of his office as such Receiver and took possession of all of the books, rec-

ords and assets of said Bank and continued in the possession and control thereof as such Receiver until December 15, 1932, on which date he resigned. Thereafter, on December 15, 1932, F. G. Awalt, then Acting Comptroller of the Currency, pursuant to the power and authority vested in him by law, as aforesaid, appointed the plaintiff, A. M. Anderson, Receiver of said National Bank of Kentucky with all the powers, duties and responsibilities given to or imposed upon a receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a receiver, and the said plaintiff forthwith qualified and thereupon entered upon the duties of his office as such Receiver, took possession of all of the books, records and assets of said Bank. Plaintiff still is in the possession and control thereof as such Receiver and is still the duly appointed, qualified and acting Receiver of said The National Bank of Kentucky.

IV.

This is a suit of a civil nature in equity brought by the plaintiff as receiver of an insolvent national bank in performance of his official duties. As such Receiver, he is an officer of the United States. This suit arises under the constitution and laws of the United States for the enforcement of a liability imposed by the laws of the United States. This is a case for winding up the affairs of a national banking association.

This suit is brought in equity for the reason that the plaintiff does not have an adequate remedy at law, because an accounting is necessary and prayed for herein to determine the proportionate part of the aggregate liability claimed against the defendants named herein for which each individual is severally liable and to determine the credit to which the defendants may be entitled, if any, by reason of the collections made by the plaintiff on account of the statutory liability hereinafter set forth. The matters set

forth herein involve complicated interests and degrees of interest among approximately six thousand stockholders of BancoKentucky Company in which the defendants, and all of said stockholders, have a common interest. The equitable determination in one action of the questions of common interest, will avoid a multiplicity of suits and circuity of actions and the unreasonable expense of separate suits which would dissipate the trust fund herein sought to be recovered for the benefit of creditors of said Bank, and, unless the plaintiff is granted the relief in equity as prayed for herein, he will suffer irreparable damage and injury.

On account of all of which the plaintiff has no adequate remedy at law and this court has jurisdiction of this suit.

V.

The defendants are named in the caption hereof and the names of said defendants are incorporated in the body of this complaint by reference to the caption hereof, the same as if fully set forth herein and are not repeated to prevent unduly encumbering the record.

The defendants are citizens and residents of the State of Pennsylvania.

The corporate defendants are either corporations organized and existing under the laws of the State of Pennsylvania, or are corporations organized and existing under the laws of other states which have qualified to do business in the State of Pennsylvania and are engaged in business therein.

Certain defendants are sued in a representative capacity, as fully set forth in the caption incorporated herein by reference. Certain other defendants, as indicated in Exhibit "A" by legend "Distributee of the estate of" a named person, have received assets from the estate of the named deceased persons who were during their lifetime liable as hereinafter set out, or from estates which were liable as hereinafter set out and such persons named as distributees

are liable to the extent of the assets received by them from such estates.

VI.

On or about the 20th day of February, 1931, J. W. Pole, as the Comptroller of the Currency of the United States, upon an accounting by Paul C. Keyes, as Receiver of The National Bank of Kentucky, and upon a valuation of the uncollected assets of said Bank remaining in the hands of Paul C. Keyes as Receiver, found to the satisfaction of the Comptroller of the Currency that in order to pay the debts of The National Bank of Kentucky, it was necessary to enforce the individual liability of the stockholders thereof to the extent hereinafter mentioned as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States, Section 1c156, Act of June 30, 1876 and Section 23, Act approved December 23, 1913, known as the Federal Reserve Act, and said Comptroller of the Currency, by virtue of the authority vested in him by law, did therefore levy and make an assessment and requisition upon the shareholders of said The National Bank of Kentucky for $4,000,000.00 to be paid by them on or before the First day of April, 1931, and did make demand upon each and every one of them for the par value of each and every share of the capital stock of said association held or owned by them respectively, at the time of its failure; and said Comptroller of the Currency did thereupon direct the Receiver of The National Bank of Kentucky to take all necessary proceedings by suit or otherwise to enforce the individual liability of said shareholders.

VII.

At the time of the closing of The National Bank of Kentucky, it had issued and outstanding 40,000 shares of capital stock of the par value of $100. each, and 39,820 of said shares were held by Henry Vogt, Thomas J. Minary, Stew-

art E. Duncan, Allen P. Dodd, Charles H. Bohmer, and Ben J. Metcalfe, as Trustees under a certain trust agreement dated April 22, 1927, entered into between the owners and holders of the capital stock of The National Bank of Kentucky and the owners and holders of the capital stock of the Louisville Trust Company. At the time of the closing of The National Bank of Kentucky, in addition to the stock of The National Bank of Kentucky, the above mentioned trustees held, under the same trust agreement, 17,235 shares of the capital stock of the Louisville Trust Company.

## VIII.

Pursuant to the terms of said trust agreement, the above mentioned trustees issued to each stockholder of The National Bank of Kentucky and to each stockholder of the Louisville Trust Company whose stock was deposited with said trustees, a transferable Trustees Participation Certificate having a par value of $100. in lieu of each share of stock of the bank or trust company having a par value of $100. Said Trustees Participation Certificate certified that the holder was the owner of shares of stock of the par value of $100. each, of the indivisible trust estate consisting of the shares of the capital stock of The National Bank of Kentucky and the Louisville Trust Company and of any other corporation acquired by the trustees under the agreement between the stockholders of said institutions previously described. This certificate was issued under the terms of the aforesaid agreement and the holder thereof, by accepting the same, consented to and adopted the terms of the certificate and the terms of the agreement, as if fully written in said certificate.

Subsequent to April 22, 1927, each share of the trust estate having a par value of $100. per share, was divided into ten shares of the trust estate, each having a par value of $10.00 per share, but, except for the change in par value, said Trustees Participation Certificates remained un-

changed and were issued under and subject to the trust agreement dated April 22, 1927.

Each Trustees Participation Certificate having a par value of $10.00 represented .0697923 of a share of the capital stock of the National Bank of Kentucky, having a par value of $100. per share.

## IX.

Each and every Trustees Participation Certificate contained on the face thereof a statement that it was issued pursuant to the trust agreement of April 22, 1927, which was recited to be on file with said National Bank of Kentucky and each and every Trustees Participation Certificate contained on its face the further agreement assented to by the holder thereof and reading as follows:

> "This certificate is issued under the terms of the aforesaid agreement and the holder hereof by accepting same, consents to and adopts said terms as if fully written herein."

One of the terms of said trust agreement of April 22, 1927, to which the above assent was given by the holders of Trustees Participation Certificates, read as follows:

> "(1) The Trustees shall not be responsible for any acts done by them as Trustees in good faith and in the exercise of an honest judgment. No Trustee shall be liable for the act or omission of another Trustee.
>
> "(2) They shall not be liable, except as Trustees to the extent of the Trust funds held by them by reason of the ownership of stock in any corporation. They shall be indemnified against any such liability by each holder of Trustees' Participation certificates to the extent hereinafter set forth.
>
> "(3) Each owner of a Trustees' Participation Certificate issued hereunder shall be subject to the same liability thereon as he would have been subject to in

case he had been the owner of record of such proportionate part of the shares held by the Trustees in any corporation as the number of shares called for by his Trustees' Participation Certificate bears to the whole number of shares covered by all outstanding Trustees' Participation Certificates; and to such extent he shall indemnify and hold harmless the Trustees owning such stock from any loss or liability on account of being the holders or owners thereof. The measure of liability assumed hereunder shall be the same as that provided by law with reference to the holders of stock in any particular corporation in which the Trustees may hold stock as is provided by law with reference to the holders of such stock, and no more."

X.

At the time of the closing of the National Bank of Kentucky as aforesaid, there were issued and outstanding 570,550 shares of the trust estate having a par value of $10.00 per share, and said shares represented 39,820 shares of the capital stock of the National Bank of Kentucky having a par value of $100. per share.

XI.

On or about July 19, 1929, the officers and directors of the National Bank of Kentucky and the officers and directors of the Louisville Trust Company and the Trustees under the trust agreement of April 22, 1927, proposed to the holders of said Trustees Participation shares of the National Bank of Kentucky and the Louisville Trust Company, that the two banks and the business conducted by them should be reorganized by adding to this group a third corporation which said officers, directors and trustees represented would make the operations of these banking institutions more profitable, and expand their facilities for the

profit of the shareholders of said banks. The plan of reorganization proposed by the officers and directors of the two banks and approved by formal resolutions of the trustees under the trust agreement of April 22, 1927, was to organize under the laws of the State of Delaware, a holding corporation to be known as the BancoKentucky Company, with an authorized capital of 2,000,000 shares having a par value of $10. each and to exchange the stock of this holding corporation for stock of the bank, represented by the Trustees Participation Certificates on the basis of two shares of the stock of said holding corporation, the BancoKentucky Company, for each Participation share.

The Trustees Participation shareholders were advised that it was an essential part of the plan that the shares of this holding corporation, the BancoKentucky Company (or at least a substantial majority thereof) be owned by the Trustees Participation shareholders and that it be managed and operated by the boards of directors and officers of the two banks. The holders of 570,550 shares of the trust estate approved and adopted the plan above described and the holders of 340,384 shares of the trust estate representing 37714.6422 shares of stock of the National Bank of Kentucky exchanged their Trustees Participation Certificates which represented the stock of National Bank of Kentucky and the Louisville Trust Company, for 1,080,768 shares of the holding company, BancoKentucky, which shares continued thereafter to represent the holders' interest in said bank stock.

XII.

Pursuant to the above described plan, the holders of the Trustees Participation shares representing approximately 95% of the stock of the National Bank of Kentucky and the Louisville Trust Company, caused said holding corporation to be organized as their agency and instrumentality, for their own use and enrichment and in furtherance of a

scheme to engage in unlawful acts and to enable them through said corporate agency and instrumentality unlawfully to acquire, own, hold, control and operate a group of state and national banks and trust companies contrary to and in defiance of the meaning, spirit and intent of the laws of the United States and of the Commonwealth of Kentucky and other states relating to the ownership, operation and supervision of banks and trust companies.

Accordingly said holding corporation, the BancoKentucky Company was incorporated under the laws of the State of Delaware on July 16, 1929, with an authorized capital of 2,000,000 shares of common stock of the par value of $10. each for the alleged purposes set forth in its articles of incorporation as follows:

> "The acquiring by purchase or otherwise of all or any portion of the capital stock, property, assets and franchises of any or all corporations transacting business in any state of the United States; the purchasing, holding, selling, assigning, transferring, mortgaging, pledging or otherwise disposing of shares of the capital stock of or any bonds, securities or evidence of indebtedness created by or issued by any other corporation or corporations organized under the laws of any State of the United States or of any foreign country and while the owner thereof to exercise all the rights, powers and privileges of ownership the purchasing or otherwise acquiring of any promissory notes or other evidences of indebtedness executed by any person, firm, association or corporation; the financing, managing or operating of any commercial or manufacturing business or enterprise; the underwriting of any issue of stocks, bonds, debentures or other securities issued by any corporation; the charging of fees or commissions for any or all services rendered or advice or assistance given to any person, firm, association or corporation; acquiring and paying for in cash, stock or bonds, of this corporation or otherwise, the good will, rights,

assets and property of any person, firm, association or corporation and to undertake or assume the whole or any part of the obligations or liabilities of any person, firm, or corporation.

"The corporation shall have power to act as registrar or transfer agent for any other association or corporation and to act as agent in general for any other person, firm, association or corporation.

"The corporation shall have full power to issue bonds, debentures or obligations of this corporation from time to time, for any of the objects or purposes of the corporation and to secure the same by mortgage, pledge, deed of trust or otherwise. The corporation shall have full power to purchase, hold, sell and transfer the shares of its own capital stock, provided it shall not use its funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of its capital; and provided, further, that shares of its own capital stock belonging to it shall not be voted upon directly or indirectly.

"The corporation shall have full power to guarantee the obligations of any other person, firm, association or corporation and to become surety therefor and to become joint maker, endorser or acceptor of any such obligations and to charge fees and commissions for such service.

"The corporation shall have full power without restriction or limit as to amount to purchase or otherwise acquire, hold, own, mortgage, sell, convey or otherwise dispose of real and personal property of every class and description in any of the States of the United States, or any foreign country, subject to the laws of such States or foreign countries.

"In general, the corporation shall have full power to carry on any other business in connection with the foregoing whether commercial, manufacturing, financial or otherwise, and to have and exercise all the

powers conferred by the laws of Delaware upon corporations formed under the act hereinafter referred to and to do any or all of the things hereinbefore set forth to the same extent as natural persons might or could do.

"The foregoing clauses shall be construed both as objects and powers, and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to that limit or restrict in any manner the powers of this corporation."

XIII.

The defendants and other shareholders of said banks in carrying out the plan and scheme aforesaid through the agency and instrumentality of their holding corporation, the BancoKentucky Company, proceeded unlawfully to acquire, own, hold, control and operate a group of state and national banks and trust companies contrary to and in defiance of the meaning, spirit and intent of the laws of the United States and of the Commonwealth of Kentucky and of other states relating to the ownership, operation and supervision of banks and trust companies and unlawfully to use the assets of said banks and trust companies in speculative financial transactions prohibited by law, and unlawfully to use the assets and property of one or more of said banks in making loans on the security of the holding company stock in violation of law.

XIV.

After the aforesaid exchange of Trustees Participation Certificates for stock of the holding corporation, the Banco-Kentucky Company, the holders of the stock of the Banco-Kentucky Company continued to be the actual, real and beneficial holders of approximately 95% of the stock of the National Bank of Kentucky and continued after the organization of the holding company, to receive all of the benefits

and advantages incident to the ownership of stock in said National Bank.

XV.

At the time of the organization of the BancoKentucky Company and at all times thereafter, the persons who appeared as stockholders of the said company exercised all the rights and privileges of shareholders of the National Bank of Kentucky and of the other banks and trust companies whose capital stock was held by BancoKentucky. Said persons who appeared as stockholders of BancoKentucky secured and retained to their own use and enrichment all the benefits and advantages of shareholders of the National Bank of Kentucky and were from the time of the organization of the BancoKentucky Company up to the time of the closing of the National Bank of Kentucky the real, actual and beneficial owners of the Trustees Participation Certificates which represented shares of stock of the National Bank of Kentucky.

From the time of its organization to the date of the closing of the National Bank of Kentucky, the BancoKentucky Company acted as a corporate agency and instrumentality for the persons whose names appeared as stockholders of said company and as such corporate agency and instrumentality for said owners of the said BancoKentucky Company stock it held the Trustees Participation Certificates which represented the shares of stock in the National Bank of Kentucky and the persons whose names appeared as stockholders of the BancoKentucky Company were the actual, real and beneficial owners of the stock of the National Bank of Kentucky.

XVI.

The holders of the Trustees Participation Certificates who organized the BancoKentucky Company as a holding

corporation for their bank stock, well knowing that said bank stock was subject to the individual liability of shareholders of National Banks, imposed by the Acts of Congress, Sections 5151 and 5234 of the Revised Statutes of the United States and knowing that bank stock of state banking institutions was subject to individual liability imposed by state laws, nevertheless, in the organization of the said Banco-Kentucky Company, intentionally undertook to evade the provisions of said sections of the Acts of Congress by deliberately omitting from the Articles of Incorporation any provision for the payment of the liability upon national and state bank stocks provided by the laws of the United States, the Commonwealth of Kentucky and other states, and deliberately and intentionally sought to evade said liability by including in the Articles of Incorporation of BancoKentucky Company the following language:

"VIII. The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever,"

and by printing in its certificates of stock the words "full paid and non-assessable," and in so attempting to evade such assessment liability perpetrated a fraud upon the depositors and creditors of the National Bank of Kentucky for whose benefit this action is brought.

## XVII.

By reason of all of the foregoing, the defendants are not entitled in equity and good conscience to the immunity recognized by law which stockholders of a bona fide lawfully formed and conducted corporation ordinarily have and defendants are not entitled in equity and good conscience to shield themselves from the assessment imposed upon them by law with said corporate form the BancoKentucky Company. By reason of the foregoing, the defendants are the real, true and beneficial shareholders of the National Bank of Kentucky and have promised to pay said assessment and

are estopped to deny said assessment liability, and are the owners of shares of stock of the National Bank of Kentucky and each of the defendants appearing to be stockholders of the BancoKentucky Company is liable for the payment of the assessment levied by the Comptroller of the Currency hereinbefore referred to, individually, ratably and proportionately to the extent that the number of shares of stock held by him bears to the total number of shares issued and outstanding.

## XVIII.

Acting pursuant to the authority and direction of the Comptroller of the Currency, the Receiver of the National Bank of Kentucky, on or about March 20th, 1931, sent and served upon each of the defendants and all the other shareholders of the BancoKentucky Company, the following assessment notice:

"Office of the Receiver
THE NATIONAL BANK OF KENTUCKY
Louisville, Kentucky

Louisville, Ky., March 20, 1931.

"As a stockholder in The BancoKentucky Company, you will please take notice, that the Comptroller of the Currency has on February 20, 1931, levied an assessment upon the stockholders of The National Bank of Kentucky, Louisville, Ky., on the par value of each and every share, payable at the Office of the Receiver on or before April 1, 1931. A notice of such assessment and a demand for payment of the same has been served upon the Receiver of The BancoKentucky Company as the holder of 540,484 trustees' participation certificates, issued under a certain trust agreement of April 22, 1927, which trustees' participation certificates represent the ownership of 37,721.624 shares of stock in The National Bank of Kentucky. You will, therefore, take notice that it is the intention of the undersigned, as

Receiver of the National Bank of Kentucky, to proceed against you for the collection of the aforesaid assessment liability represented by the said trustees' participation certificates held by said BancoKentucky Company, to the extent that the undersigned, as Receiver of the National Bank of Kentucky, is unable to collect said assessment from The BancoKentucky Company or its Receiver.

Paul C. Keyes
RECEIVER OF THE NATIONAL
BANK OF KENTUCKY
Louisville, Kentucky

Registered Letter
Return Receipt Requested."

Enclosed therewith and attached thereto was a copy of the order of assessment upon shareholders made by the Comptroller of the Currency of the United States hereinabove described.

XIX.

Thereafter, the Receiver of the National Bank of Kentucky secured leave of the Jefferson County Circuit Court, which had previously appointed a receiver for the BancoKentucky Company, to file an action against the receiver of the BancoKentucky Company to collect said assessment and leave having been secured, the receiver, on October 31, 1931, filed an action in this court against Joseph S. Laurent, Receiver of the BancoKentucky Company, praying for judgment by reason of the assessment in the amount of $3,772,162.40. Said cause being docketed in the United States District Court for the Western District of Kentucky as No. 1383. Thereafter, the cause was heard and on September 14, 1932, the Receiver of the National Bank of Kentucky recovered judgment for the full amount of the assessment, plus interest at the rate of six per cent (6%) per annum.

Said judgment was entered September 14, 1932. Said judgment has been affirmed by the United States Circuit Court of Appeals and said judgment has become final and except for a credit of $90,745.17, hereafter described, is wholly unpaid and unsatisfied.

XX.

On December 18th, 1934, the Receiver of the BancoKentucky Company paid to the plaintiff, as Receiver of the National Bank of Kentucky, the sum of $90,745.17, said payment being made to plaintiff as a creditor of BancoKentucky Company by reason of the judgment mentioned above and said payment is the only money paid to the plaintiff on account of the judgment for stock assessment up to the present time. The plaintiff says that there are other moneys which he may collect from the Receiver of the BancoKentucky company, before the assets in the hands of said Receiver are completely exhausted, but plaintiff says that there are numerous controversies with respect to the distribution of the assets of the BancoKentucky Company and says that for this reason he is unable to state at the present time what if any further sum may eventually be paid by the Receiver of the BancoKentucky Company on account of said judgment, but plaintiff alleges that BancoKentucky Company is hopelessly insolvent and any payment that might be made will be relatively small and that said judgment will remain substantially unsatisfied.

XXI.

Plaintiff says that the depositors and creditors of the National Bank of Kentucky have only been paid up to the present time, sixty-seven (67%) per cent of the face amount of their deposits and claims.

XXII.

Plaintiff further says that there is due him as Receiver of the National Bank of Kentucky by reason of the stock assessment on the 37,714.6422 shares of National Bank of Kentucky stock held by the BancoKentucky Company as the agency and instrumentality of the defendants and other shareholders of said company, and in accordance with their plan adopted as aforesaid, the sum of $3,771,464.22, less $90,745.17 paid on December 18th, 1934.

XXIII.

On January 14th, 1930, the Articles of the BancoKentucky Company were amended and the authorized capital stock in said company was increased from 2,000,000 to 5,000,000 shares, each share having a par value of $10.00. At the time of the closing of the National Bank of Kentucky, there was issued and outstanding 2,072,468 shares of the capital stock of the BancoKentucky Company.

XXIV.

Each of the defendants and each stockholder of the BancoKentucky Company not named a defendant herein is individually liable to pay said assessment in the proportion that his shares of stock of the BancoKentucky Company bears to the total number of shares of the BancoKentucky Company issued and outstanding at the date of the closing of the National Bank of Kentucky. The plaintiff is informed and believes that the sum due from each stockholder of BancoKentucky Company, including interest to the date of the filing of this petition, amounts to approximately $2.304909 for each share of stock of the BancoKentucky Company registered in his name or owned by him at the time of the closing of the National Bank of Kentucky.

XXV.

The several defendants named herein are holders or are personal representatives or distributees of estates of holders of BancoKentucky Company stock in the amounts set out opposite their respective names on the schedule and list hereto attached, made a part hereof, and marked "Exhibit A," and are each indebted to the plaintiff as Receiver of the National Bank of Kentucky in the estimated amounts set opposite their respective names on said Exhibit A, in the column thereof designated "Amount of Assessment," together with interest at the rate of six per cent (6%) per annum.

XXVI.

Plaintiff, therefore, prays:

1. That a subpoena be issued according to the course and practice of this court, requiring the defendants to appear and answer this Bill of Complaint, but not under oath, answer under oath being hereby expressly waived according to the rules and practice of this court.

2. That an accounting be made and stated to determine the number of shares of the stock of BancoKentucky Company that were issued and outstanding at the date of the failure of the National Bank of Kentucky; to determine the number of shares of the capital stock of the National Bank of Kentucky that were represented by the Trustees Participation Certificates held by the BancoKentucky Company as the agency and instrumentality of the defendants and the other stockholders of the BancoKentucky Company; to determine the proportionate part of a share of stock of the National Bank of Kentucky which was represented by a share of stock in BancoKentucky Company; to determine

the proportionate amount of the assessment for which each holder of the stock of the BancoKentucky Company is liable giving due and proper credit to said defendants and the other stockholders of BancoKentucky Company for such part of the assessment that the Receiver has collected, or may hereafter collect, and for which said defendants and other shareholders are entitled to credit.

3. That the court fix and determine the number of shares of National Bank of Kentucky stock of which the several defendants, or their decedents or transferors, were the real and beneficial owners, and the assessment liability thereon, and that upon such accounting, the plaintiff be awarded a judgment and decree against the several defendants for the amount, by said accounting found to be due from each of them.

4. That plaintiff may have such further, other and different relief in the premises to which he may be entitled, and as shall be agreeable to equity and good conscience.

THOMAS A. LOGUE,
Solicitors for Plaintiff

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State of Kentucky )
County of Jefferson )

On this 6th day of February, 1937, before me, a Notary Public, in and for said County, personally appeared A. M. Anderson to me personally known, who being duly sworn did say that he is the Receiver of the National Bank of Kentucky, an insolvent national banking association; that he has read the foregoing Bill of Complaint and that he

executed the same and that the allegations contained therein are true as he verily believes.

A. M. ANDERSON,
Receiver of the National Bank of Kentucky.

Subscribed and sworn to before me by A. M. Anderson, Receiver of the National Bank of Kentucky, this 6th day of February, 1937.

My commission expires on the 6th day of June, 1937.

KARL C. CASSADY,
(Seal) Notary Public, Jefferson County, Kentucky.

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## EXHIBIT "A".

| Number of Item | Name | Number of Shares | Amount of Assessment |
|---|---|---|---|
| 1 | Andrews, Mrs. Julia Dupont | 80 | $ 184.39 |
| 2 | Berger, Mrs. Hazel | 120 | 276.58 |
| 3 | Bradford, Katherine N. | 60 | 138.29 |
| 4 | Bradford, William | 20 | 46.09 |
| 5 | Brooks, Mrs. Nellie Sanders | 150 | 345.73 |
| 6 | Childers, James Glen | 30 | 69.14 |
| 7 | Cope, Mrs. Elisabeth S. | 1400 | 3,226.87 |
| 8 | Cope, Francis R. Jr. | 2560 | 5,900.56 |
| 9 | Fidelity-Philadelphia Trust Company, Substitute Trustee for Charles N. Davis under the will of Charles W. Poultney, deceased, | 256 | 590.05 |
| 10 | Davis, Charles N. | 256 | 590.05 |

*Bill of Complaint—Exhibit "A,"*
*List of Defendants*

| | | | |
|---|---|---|---|
| 11 | Girard Trust Company, Trustee u/d Jane Gray Glen Childers | 700 | 1,613.43 |
| 12 | Childers, Jane Gray Glen | 700 | 1,613.43 |
| 13 | Girard Trust Company, Trustee, Clementine Cope and Annette Cope Memorial Fund | 540 | 1,244.65 |
| 14 | Girard Trust Company, Trustee u/d James Lyle Glenn | 240 | 553.17 |
| 15 | Glenn, James Lyle | 240 | 553.17 |
| 16 | Grauf, Gottlieb | 324 | 746.79 |
| 17 | Gunster, Joseph F. | 400 | 921.96 |
| 18 | Harlan, James D. | 90 | 207.44 |
| 19 | Heyer, Catherine B. | 70 | 161.34 |
| 20 | Heyer, Harriet, Executrix of the Estate of Edward G. Heyer, deceased | 100 | 230.49 |
| 21 | Heyer, Harriet, Distributee of the Estate of Edward G. Heyer, deceased | 100 | 230.49 |
| 22 | Heyer, Mrs. Harriet | 100 | 230.49 |
| 23 | Hillenmeyer, Miss Grace A. | 260 | 599.27 |
| 24 | Holland, Leicester B. | 160 | 368.78 |
| 25 | Holland, Mrs. Louise Adams | 100 | 230.49 |
| 26 | Holland, Rupert S. | 160 | 368.78 |
| 27 | Linville, Newton | 40 | 92.19 |
| 28 | Loving, R. Courtenay | 260 | 599.27 |
| 29 | McCowan, Carolina S. | 32 | 73.75 |
| 30 | Morgan, Stewart | 50 | 115.24 |
| 31 | Neide, Miss Blanche E. | 200 | 460.98 |
| 32 | Pilson, Jesse | 10 | 23.04 |
| 33 | Pridgen, Mrs. Elsa Neide Brooke | 110 | 253.53 |
| 34 | Putnam, Mrs. Lucy S. | 146 | 336.51 |

| | | | |
|---|---|---|---|
| 35 | Roland, Charles | 360 | 829.76 |
| 36 | Rolph, Elizabeth C. | 480 | 1,106.35 |
| 37 | Seaman, Mrs. Mary E. | 184 | 424.10 |
| 38 | Fidelity-Philadelphia Trust Company, Agent for Mrs. Rebecca B. Willing Spencer | 520 | 1,198.55 |
| 39 | Spencer, Mrs. Rebecca B. Willing | 520 | 1,198.55 |
| 40 | Tunney, Joseph J. | 65 | 149.81 |
| 41 | Christie, Robert D., Executor of the Estate of Pauline W. Christie, deceased | 120 | $276.58 |
| 42 | Christie, Robert D. Distributee of the Estate of Pauline W. Christie, deceased | 120 | $276.58 |
| 43 | Weyer, Mary Christie, Distributee of the Estate of Pauline W. Christie, deceased | 120 | $276.58 |
| 44 | Christie, John W., Distributee of the Estate of Pauline W. Christie, deceased | 120 | $276.58 |
| 45 | Steere & Company | 1,960 | 4,517.62 |

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## AMENDED AND SUPPLEMENTAL PETITION [COMPLAINT].

Now comes A. M. Anderson, Receiver of the National Bank of Kentucky, and amends and supplements his petition filed in this cause for the purpose of adding several defendants in the same position as the defendants previously mentioned and listed in the previous action.

Your Receiver hereby adopts the allegations contained in this petition and reavers the same as though said allegations were set out herein in full.

Your Receiver further states that at the time of the closing of the National Bank of Kentucky, Martha R. Blessing was the owner and holder of 400 shares of BancoKentucky Company stock and that by reason of the allegations of the petition, which allegations are adopted and re-averred here by reference thereto, there is due the Receiver of the National Bank of Kentucky from said Martha R. Blessing by way of stock assessment the sum of Nine Hundred Twenty-one and 26/100 ($921.26) Dollars.

Your Receiver further states that at the time of the closing of the National Bank of Kentucky Gault & Company was listed on the records of the National Bank of Kentucky as the owner of 500 shares of BancoKentucky Company stock.

Your Receiver further states that A. Irvin Voss, William W. Haig and Lena Schmidte conducted a business and operated under the fictitious name of Gault & Company and registered for the purpose of conducting such business with the Department of State of the Commonwealth of Pennsylvania on April 13, 1931. Thereafter, on October 13, 1931 said registration was cancelled.

Your Receiver states that by reason thereof said A. Irvin Voss, William W. Haig and Lena Schmidte became the owners of 500 shares of BancoKentucky Company stock, above referred to, and subject to assessment in the sum of Eleven Hundred Fifty-two and 45/100 ($1152.45) Dollars.

Wherefore, plaintiff prays as in his original petition and that a subpoena issue directed to said additional defendants.

THOMAS A. LOGUE,
Solicitor for Plaintiff.

*Motion of Girard Trust Co., Trustee, to Dismiss Bill of Complaint*

State of Kentucky,
Commonwealth of Jefferson, } ss:

On this 15th day of February, 1937, before me a Notary Public in and for said county, personally appeared A. M. Anderson, to me personally known, who being duly sworn, did say that he is Receiver of the National Bank of Kentucky, an insolvent national banking association; that he has read the foregoing bill of complaint and that the allegations contained therein are true as he verily believes.

A. M. ANDERSON.

Sworn to before me and subscribed in my presence this 15th day of February, 1937.

C. B. RECKTENWALD,
Notary Public, Jefferson County, Kentucky.

My commission expires on the 15th day of October, 1940.

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## MOTION OF GIRARD TRUST COMPANY, TRUSTEE, TO DISMISS BILL OF COMPLAINT.

(Filed March 11, 1937.)

AND NOW, March 11, 1937, come GIRARD TRUST COMPANY, Trustee under Deed of Jane Gray Glenn Childers, GIRARD TRUST COMPANY, Trustee under Deed of James Lyle Glenn, GOTTLIEB GRAUF, and JONATHAN M. STEERE, GILBERT L. BISHOP, JR., E. B.

*Motion of Girard Trust Co., Trustee, to Dismiss Bill of Complaint*

MORRIS, JR., GEORGE H. STUART, III, and THOMAS S. HOPKINS, partners, trading and doing business under the firm name and style of STEERE & COMPANY, parties defendant in the above entitled cause, by their attorneys, Wintersteen, McCoy & Wintersteen, and, not confessing nor acknowledging any of the allegations or averments therein set forth, move to dismiss the Bill of Complaint filed in the above proceedings, for the following reasons:

1. Nonjoinder of the Receiver of the BancoKentucky Company.

The Bill, on its face, shows that the said Receiver is a necessary party to this suit.

2. Nonjoinder of all other stockholders of The Banco Kentucky Company.

The Bill, on its face, shows that all the stockholders of the said Company are necessary parties to this suit.

3. The facts alleged are insufficient to constitute a valid cause of action in equity.

4. The allegations of the Bill are insufficient to establish, *prima facie*, that the individual defendants are liable, as stockholders of the National Bank of Kentucky, for payment of the assessment levied upon the stock of the said Bank by the Comptroller of the Currency.

The Bill merely states the legal conclusion that the defendants are the beneficial shareholders of the said bank stock.

5. Laches.

The Bill was not filed within a reasonable time after the alleged cause of action arose.

*Motion of Girard Trust Co., Trustee, to Dismiss Bill of Complaint*

6. The plaintiff has a full, adequate and complete remedy at law.

WINTERSTEEN, McCOY & WINTERSTEEN,
By JOHN WINTERSTEEN,
Attorneys for Girard Trust Company, Trustee under Deed of Jane Gray Glenn Childers, Girard Trust Company, Trustee under Deed of James Lyle Glenn, Gottlieb Grauf, and Jonathan M. Steere, Gilbert L. Bishop, Jr., E. B. Morris, Jr., George H. Stuart, III, and Thomas S. Hopkins, partners, trading and doing business under the firm name and style of Steere & Company.

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United States of America
Eastern District of Pennsylvania } ss.

JOHN WINTERSTEEN, being duly sworn according to law, deposes and says that, in his opinion, the foregoing Motion to Dismiss is well founded in law and in fact, and that the said Motion to Dismiss is not interposed for delay.

(signed) JOHN WINTERSTEEN.

Sworn to and subscribed before me this 11th day of March, 1937.

(signed) HELEN L. LOBULL,
Notary Public.

(Seal)

My commission expires: Jan. 6, 1939.

## ADDITIONAL MOTIONS TO DISMISS COMPLAINT IN 1937.

NOTE:

The motions of the following to dismiss the complaint have been omitted.

Mrs. Elizabeth S. Cope, Girard Trust Company, Trustee, Clementine Cope and Annette Cope Memorial Fund, Leicester B. Holland, Mrs. Louise Adams Holland and Rupert S. Holland, filed March 13, 1937.

Francis R. Cope, Jr., filed March 13, 1937.

Fidelity-Philadelphia Trust Company, Trustee under the Will of Blanche E. Neide, Deceased, filed March 22, 1937.

A. Irvin Voss and Lena Schmidte, filed March 24, 1937.

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## ANSWER OF HAZEL BERGER AND MARY E. SEAMAN.

(Filed March 19, 1937.)

TO THE HONORABLE, THE JUDGES OF SAID COURT:

The answer of Hazel Berger and Mary E. Seaman to the Bill of Complaint filed in the above entitled proceedings respectfully showeth:

I. Admitted.

II. Admitted.

III. Admitted.

IV. Admitted except as hereinafter qualified.

V. Admitted.

VI. The defendants in answer to the 6th paragraph, deny that they own or ever owned stock in the National Bank of Kentucky and therefore deny liability herein.

VII. Defendants aver that the allegations in the 7th paragraph of plaintiff's Bill are not material to them for the reason that they never owned any stock in the National Bank of Kentucky or the Louisville Trust Company.

VIII. In answer to the 8th paragraph of plaintiff's Bill, defendants aver that they never did own any stock in the National Bank of Kentucky or the Louisville Trust Company.

IX. In answer to the 9th paragraph of plaintiff's Bill, defendants aver that the averments contained therein are not material since defendants had no stock in the banks therein mentioned.

X. The defendants not owning any stock in the Bank of Kentucky aver that the allegations therein are immaterial as to them.

XI. The defendants, not owning any stock in the Bank of Kentucky, aver that the allegations therein are immaterial as to them.

XII. The defendants, not owning any stock in the Bank of Kentucky and Louisville Trust Company, deny the averments in paragraph 12 of plaintiff's Bill.

XIII. The defendants deny the averments of paragraph 13 of plaintiff's Bill. Defendants are advised and therefore aver that a corporation can lawfully acquire, own, hold and control stock in a national bank or a number of national banks. Defendants aver that the allegations of paragraph 13 are improperly made in that said allegations set forth conclusions of law.

XIV. The defendants, in answer to the 14th paragraph of plaintiff's Bill, aver that they never owned any stock in the National Bank of Kentucky.

XV. The defendants deny that the Banco Kentucky Company acted as a corporate agency and instrumentality for them for the reason that they never owned any stock in the National Bank of Kentucky.

XVI. In answer to the 16th paragraph, defendants deny that they perpetrated a fraud upon the depositors and creditors of the National Bank of Kentucky for the reason that they never owned any stock in said bank.

XVII. In answer to the 17th paragraph of plaintiff's Bill, defendants, not having owned any stock in the National Bank of Kentucky, and not having traded or exchanged any stock of the National Bank of Kentucky for Banco Kentucky Company stock, aver that they have no liability in equity and good conscience for the payment of the assessment levied by the Comptroller of Currency upon the shareholders of the National Bank of Kentucky.

XVIII. Defendants deny that they received the letter set forth in paragraph 18 of plaintiff's Bill.

XIX. Defendants admit the averments of paragraph 19 of plaintiff's Bill.

XX. Defendants admit the averments of paragraph 20 of plaintiff's Bill.

XXI. Defendants admit the averments of paragraph 21 of plaintiff's Bill.

XXII. Defendants deny that they are affected by the assessment set forth in paragraph 22 for reasons hereinafter set forth.

XXIII. Defendants admit the averments of paragraph 23 of plaintiff's Bill.

XXIV. Each of the defendants herein denies that she is individually liable to pay an assessment on shares of stock owned by her in the Banco Kentucky for the reason that defendants never owned any shares of stock in the National Bank of Kentucky or the Louisville Trust Company and the Banco Kentucky did not hold National Bank stock of Kentucky or Louisville Trust Company stock as their assignee, agent or in any other capacity whatsoever.

XXV. The defendants herein deny that they are indebted to the receiver of the National Bank of Kentucky as averred in paragraph 25 of plaintiff's Bill for reasons given in paragraph 24th above.

WHEREFORE defendants, Hazel Berger and Mary E. Seaman, pray your Honorable Court to dismiss the Bill of claimant as to them for the reason that the defendants, Hazel Berger and Mary E. Seaman, were not the real or beneficial owners of any shares of stock at any time in the National Bank of Kentucky or the Louisville Trust Company.

*Answer of Stewart Morgan, One of the Defendants Named*

AND they will ever pray, etc.

HAZEL BERGER,
MARY E. SEAMAN,
Defendants.

CHARLES M. DONLEY,
Solictor for Defendants,
1403 Law & Finance Building,
Pittsburgh, Pennsylvania.

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ANSWER OF STEWART MORGAN, ONE OF THE DEFENDANTS NAMED.

(Filed April 1, 1937.)

Stewart Morgan, one of the defendants named in the above entitled cause, in answer to the Bill in Equity filed therein, avers that he has full, just and true defense to the averments therein contained of the following nature and character, to wit:

1. Admitted.

2. Admitted.

3. Admitted.

4. Defendant avers that the plaintiff has an adequate remedy at law against the registered holders of the stock of The National Bank of Kentucky, or against any alleged real owners of said stock.

5. The defendant avers that he has no knowledge of the averments contained in this paragraph of the Plaintiff's Bill in Equity, and that the means of proof thereof are solely within the knowledge and control of the plaintiff and the defendant demands proof thereof.

*Answer of Stewart Morgan, One of the Defendants Named*

6. The defendant avers that he has no knowledge of the averments contained in this paragraph of the Plaintiff's Bill in Equity, and that the means of proof thereof are solely within the knowledge and control of the plaintiff and the defendant demands proof thereof.

7. The defendant avers that he has no sufficient knowledge either to admit or deny the averments contained in this paragraph of the Plaintiff's Bill and further avers that the means of proof of said allegations are solely within the knowledge and control of the plaintiff, and defendant demands proof thereof.

8. The defendant avers that he owned a participation certificate in 1927 and that in 1929 he relinquished all right, title or interest in said certificate and is no longer the owner thereof. The defendant does not remember what provisions were contained on the face of said certificate and has been unable to obtain any information with reference thereto: accordingly, the defendant denies the averments of this paragraph of the Plaintiff's Bill and demands proof thereof.

9. The defendant has no knowledge of the averments contained in this paragraph and the means of proof thereof are within the control of the plaintiff; the defendant denies the same and demands proof thereof.

10. The defendant has no knowledge of the averments contained in this paragraph and the means of proof thereof are within the control of the plaintiff; the defendant denies the same and demands proof thereof.

11. The defendant avers that he exchanged his participation certificate for stock in the Banco Kentucky Company, but denies that he was a party to any illegal plan or scheme,

and further denies that he approved or consented to, or was a party to, any illegal plan or scheme involving the creation of the Banco Kentucky Company or any of the objects or purposes for which it was formed.

12. The defendant denies that he caused or assisted in causing the organization of the Banco Kentucky Company, for unlawful purposes or otherwise, and avers that he had no part in the organization of said Company and had no interest in said Company until after it was organized: further, that when he purchased stock in said holding company, he believed it to be legally organized and authorized to do business in the State of Kentucky under the provisions of its charter and the laws of the State of Kentucky and the United States; that he had, and now has, no knowledge of the provisions of the Charter of said corporation and that if the same are in any way illegal, he is without knowledge of such illegality; further that if any of the acts of said corporation or of the directors or officers of said corporation were, or are illegal or fraudulent, he was and is without knowledge thereof and is not, in any way, responsible therefor.

13. The defendant denies that he was a party to any plan or scheme as alleged in Plaintiff's Bill; defendant avers that he does not know how the Banco Kentucky Company was managed and that he was never a director of said corporation and never attended a meeting of the stockholders of said corporation; further, that if said corporation or the directors or officers or the stockholders thereof ever did any illegal act or thing, it was without the knowledge or consent of this defendant.

14. The defendant denies that by reason of his ownership of stock in the Banco Kentucky Company he was ever

the holder or real owner of any stock in the National Bank of Kentucky.

15. The defendant denies that he, as a stockholder of the Banco Kentucky Company, exercised all the rights and privileges of the shareholders of the National Bank of Kentucky and of the other Banks and Trust Companies whose capital stock was held by the Banco Kentucky Company.

The *defendant denies* that Banco Kentucky Company acted as a corporate agency and instrumentality of the defendant, and further denies that he was, or now is, the real and beneficial owner of any stock of the National Bank of Kentucky.

16. The defendant denies that he, either alone or in concert with other persons, undertook to evade the provisions of said sections of the Acts of Congress, with reference to the liability, or payment of the liability, imposed upon holders of stock in national or state banks. The defendant again avers that he had nothing to do with the incorporation or the formulating of the articles of the corporation of the said Banco Kentucky Company.

17. The defendant denies that he is the real, true and beneficial owner of any shares of stock of the National Bank of Kentucky, and denies that he has done anything in the premises which would make him so liable.

18. Admitted.

19. The defendant has no knowledge of the truth or falsity of the allegations, but avers that he has been informed and verily believes that the action alleged to have been filed by the Receiver of the National Bank of Kentucky against the Receiver of the Banco Kentucky Company pleaded and proved that the Banco Kentucky Company was the owner

of the stock of the National Bank of Kentucky standing in its name, and not the holder thereof as agent for anyone; and this defendant further avers that he has never at any time appointed Banco Kentucky Company to act as agent for him, or, if said company has claimed to have acted as such agent, has never in any way ratified such action or such claim.

20. The defendant avers that he has no knowledge of the allegation in this paragraph of the Plaintiff's Bill, and avers that the means of proof thereof are within the control of the Plaintiff, and the defendant demands proof of said averment.

21. Admitted.

22. The defendant denies that there is anything owing by him to the plaintiff, as Receiver of the National Bank of Kentucky, by reason of said stock assessment; the defendant avers that he has never, at any time, made or ratified any agency relationship or agreement with the Banco Kentucky Company, and that his relation to said Banco Kentucky Company is only that of a mere stockholder in said Company, without knowledge of improper or illegal actions or purposes on the part of said Company or any director, officer or stockholder thereof, if any there be.

23. The defendant has no knowledge of this averment, and neither admits nor denies the same.

24. The defendant denies that he is liable to pay any assessment on any shares of stock in the National Bank of Kentucky, for the reasons hereinabove stated, and more particularly for the reason that he, at the time said assessment was made, and for a period of sixty days prior to the suspension of business of said Bank, was not, and now is

not, a registered owner, nor is he the real or actual owner, of any shares of stock in the said National Bank of Kentucky.

25. The defendant again denies that he is indebted to the plaintiff in any sum for any reason whatsoever, and that he has a full and just defense to all of plaintiff's claim, for the reasons hereinabove set forth.

WHEREFORE, the defendant prays your Honorable Court to dismiss the Plaintiff's Bill with costs.

(s) STEWART MORGAN,
One of the Defendants.

(s) CHARLES H. WEIDNER,
Attorney for Defendant, Stewart Morgan.

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## STIPULATION OF COUNSEL.

(Filed May 18, 1937.)

It is hereby stipulated by and between THOMAS A. LOGUE, ESQUIRE, counsel for A. M. Anderson, Receiver of the National Bank of Kentucky, the plaintiff above named, and ARTHUR LITTLETON, ESQUIRE, counsel for Blanche E. Neide, one of the defendants above named, that the Bill in Equity and the Subpoena issued thereunder shall be amended so as to eliminate therefrom Blanche E. Neide, she being deceased, and to substitute therefor the Fidelity-Philadelphia Trust Company, her duly qualified Trustee under her last Will and Testament, which was filed for probate in Philadelphia County on the 29th day of No-

vember, A. D. 1929, and the case proceed as if originally started against said person as Trustee.

THOMAS A. LOGUE,
Attorney for Plaintiff.
ARTHUR LITTLETON,
Attorney for Defendant.

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## MOTION OF GIRARD TRUST COMPANY, TRUSTEE, TO DISMISS BILL OF COMPLAINT.

(Filed August 28, 1944.)

AND NOW, to wit: August 28th, 1944, come GIRARD TRUST CO., Trustee, under deed of Jane Gray Glenn Childers; GIRARD TRUST CO., Trustee, under deed of James Lyle Glenn and Gotlieb Grauf, parties defendant, in the above entitled cause by their attorneys, Ballard, Spahr, Andrews and Ingersoll, and neither confessing nor acknowledging any of the allegations or averments set forth in the Bill of Complaint, move to dismiss the Bill of Complaint filed in the above proceedings, and assign in support of such motion the following reasons:

1. The facts set forth therein are insufficient to constitute a valid cause of action in equity or at law.

2. The Bill was not filed within a reasonable time after the alleged cause of action arose, and was not filed within the time prescribed by the applicable Statutes of Limitations, and in particular within the time prescribed by the Act of Commonwealth of Pennsylvania of June 26th, 1895, P. L. 375, Chapter 71 of the General Statutes of Kentucky, Art. III, Sec. 2.

*Motion of Girard Trust Co., Trustee, to Dismiss Bill of Complaint*

3. The Complainant has a full, adequate and complete remedy at law, inasmuch as (a) the assessment of the Comptroller of the Currency was for the full par value of the stock of National Bank of Kentucky; (b) the liabilities if any, of each defendant for the said assessment is several and not joint; and (c) under the allegations of the bill no accounting is necessary.

BALLARD, SPAHR, ANDREWS & INGERSOLL,
By JOHN WINTERSTEEN,
Attorneys for Girard Trust Co., Trustee, under Deed of Jane Gray Glenn Childers: Girard Trust Co., Trustee under deed of James Lyle Glenn and Gotlieb Grauf.

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United States of America }
Eastern District of Pennsylvania } ss.

JOHN WINTERSTEEN, being duly sworn according to law, deposes and says that in his opinion the foregoing motion to dismiss is well founded in law and in fact; and that the said motion to dismiss is not interposed for delay.

(S) JOHN WINTERSTEEN.

Sworn to and subscribed before me this 28th day of August, A. D. 1944.

AGNES M. HAMILTON,
Notary Public.

My commission expires 3/5/44.

*Additional Motions to Dismiss Bill of Complaint in 1944 and 1945*
*Motion for Summary Judgment*

## ADDITIONAL MOTION TO DISMISS BILL OF COMPLAINT IN 1944.

NOTE:

The motion of E. B. Morris, Jr., and T. S. Hopkins, et al., partners, trading and doing business under the firm name and style of Steere & Co., filed August 28, 1944, to dismiss the complaint has been omitted.

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## ADDITIONAL MOTION TO DISMISS COMPLAINT IN 1945.

Motion to dismiss of Elizabeth S. Cope, item 4 of the Receiver's designation; motion of F. R. Cope, item 5 of designation; motion of Fidelity-Philadelphia Trust Company, item 7 of designation; motion of A. Irvin Voss, item 8 of designation; motion of Julia DuPont Andrews, item 13 of designation, have been omitted from the printed record for the reason that said motions raise the same points as raised by motion of Girard Trust Company which appears page 40a of record.

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## MOTION FOR SUMMARY JUDGMENT.

(Filed May 8, 1945.)

AND NOW, comes A. M. Anderson, Receiver of the National Bank of Kentucky, plaintiff herein, by his counsel,

pursuant to Rule 56 (a), moves the Court for a summary judgment in his favor in this cause.

ROBERT S. MARX,
FRANK E. WOOD,
HARRY KASFIR,
VINCENT C. VELDORALE,
Attorneys for A. M. Anderson, Receiver National Bank of Kentucky.

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## OPINION ON MOTION TO DISMISS.

(Filed August 3, 1945.)

BARD, J.

Defendants seek dismissal of the complaint under Rule 12 (b) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, because the complaint was not filed within the time prescribed by the applicable statute of limitations. The suit was brought by the Receiver of The National Bank of Kentucky to recover an assessment made by the Comptroller of the Currency under the provisions of Section 12 of the National Bank Act[1] and Section 23 of the

The facts, insofar as they are pertinent hereto, are as follows:

The National Bank of Kentucky, domiciled at Louisville, Kentucky, a national banking association organized under the laws of the United States of America, failed November 15, 1930. On November 17, 1930 the Comptroller of the Currency of the United States appointed a receiver for the bank pursuant to the power and authority vested in him by

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[1] Rev. Stat. §5151, 12 U.S.C.A. §63.

Federal Reserve Act.[2]

[2] Act of December 23, 1913, c. 6, §23, 38 Stat. 273, 12 U.S.C.A. §64.

law. On February 20, 1931 the Comptroller of the Currency levied an assessment upon the shareholders of the bank of $4,000,000, representing the par value of the 40,000 shares of stock outstanding, payable on or before April 1, 1931 at the office of the receiver in Louisville, and directed the receiver to take all steps necessary to enforce the liability of the shareholders. Practically all of the stock was controlled by the BancoKentucky Company, a holding corporation organized under the laws of the State of Delaware under a complicated investment and reorganization plan; the details of which are not pertinent to this opinion. On March 20, 1931 the receiver notified the stockholders of the BancoKentucky Company of the assessment, of a demand for payment which had been made upon the receiver of the BancoKentucky Company, and of the receiver's intention to proceed against them to the extent of any portion of the assessment not paid by the BancoKentucky Company.

In October 1931 the receiver sued BancoKentucky Company on the assessment as holder of substantially all the bank shares and obtained a judgment which was affirmed on appeal. Laurent v. Anderson, 6th Cir., 70 F. (2d) 819. About $90,000 was paid on that judgment. In February 1936 the receiver brought an action in the United States District Court for the Western District of Kentucky against stockholders of the BancoKentucky Company who were residents of Kentucky to recover a proportionate share of the assessment from them. On review, the Supreme Court of the United States held that the BancoKentucky stockholders were liable on the assessment and remanded the cause to the District Court for appropriate action. Anderson, Receiver v. Abbott, Administratrix, 321 U. S. 349, 64 S. Ct. 531, 88 L. ed. 535, rehearing denied, 321 U. S. 804, 64 S. Ct. 845, 88 L. ed. 780.

This case, instituted February 18, 1937, is a similar suit against BancoKentucky shareholders residing in Pennsylvania. The defendants move to dismiss the complaint for

failure to bring the suit within the time prescribed by the applicable statute of limitations.

Two questions must be answered: (1) when did the cause of action arise; (2) What is the applicable statute of limitations?

Before discussing these questions specifically a few relevant principles of law should be adverted to.

The liability of a shareholder of an insolvent national bank for an assessment equal to the par value of his stock is contractual in nature. Chisholm v. Gilmer, Receiver, 299 U. S. 99, 57 S. Ct. 65, 81 L. ed. 63; Brown v. O'Keefe, Receiver, 300 U. S. 598, 57 S. Ct. 543, 81 L. ed. 827; Bernheimer v. Converse, 206 U. S. 516, 27 S. Ct. 755, 51 L. ed. 1163. Although the liability finds its origin in a statute, the statute is considered to impose a contractual clause in every subscription or purchase of stock. By his purchase the stockholder agrees that he shall be liable for an assessment in accordance with the terms of the statute, Platt v. Wilmot, 193 U. S. 602, 24 S. Ct. 542, 48 L. ed. 809, and assumes whatever conditions or burdens the statutes have imposed as incident to the holding of national bank shares.

Ordinarily an action to enfore contractual liability is brought on the law side of the court. However, because plaintiff here seeks an accounting and other equitable relief, this action is within the equity jurisdiction of the court, but the right which is the basis of the suit remains a legal right. Since equity merely affords plaintiff a means of enforcing his legal claim, the jurisdiction of equity is concurrent with that of law. In this situation the period within which suit may be brought is determined by the statute of limitations applicable to the legal right and not by the doctrine of laches. Russell v. Todd, 309 U. S. 280, 60 S. Ct. 527, 84 L. ed. 754; Overfield v. Pennroad Corporation, 3rd Cir., 146 F. (2d) 889.

1. *Date when the cause of action accrued and the statute of limitations began to run.* The federal statutes impose an

obligation, contingent upon an assessment by the Comptroller of the Currency, upon every holder of national bank shares to pay an amount equal to the par value of the shares. This contingent obligation becomes an absolute liability upon proclamation of the assessment. Although the order of assessment removes the contingency, it does not give rise to a clause of action. Reich v. Van Dyke, 3rd Cir., 107 F. 2d 682; Strasburger v. Schram, D. C., 93 F. (2d) 246. The receiver cannot bring an action to recover the assessment until the date when the assessment is to be paid arrives and the shareholder fails to tender payment. It is this failure to pay the assessment on the date fixed that creates the cause of action and it is on this date that the statute of limitations begins to run. Pufahl, Receiver v. Estate of Parks, 299 U. S. 217, 57 S. Ct. 151, 81 L. ed. 133; McDonald v. Thompson, 184 U. S. 71, 22 S. Ct. 297, 46 L. ed. 437; Hawkins v. Glenn, 131 U. S. 319, 9 S. Ct. 739, 33 L. ed. 184; Glenn v. Marbury, 145 U. S. 499, 12 S. Ct. 914, 36 L. ed. 790. Therefore, although the order of assessment was made February 20, 1931, plaintiff's cause of action did not accrue until April 1, 1931, the date upon which payment was due, and computation of limitation of actions must begin on that date.

2. *The applicable statute of limitations.* The law of the forum governs so far as the limitation of actions is concerned. In the absence of a federal statute limiting the time in which to bring an action to enforce the liability of national bank stockholders, the state statutes of limitations are applicable[3]. Although this right of action is based on a federal statute, it may be enforced only in conformity to the law of the forum. Rawlings, Receiver v. Ray, 312 U. S. 96, 61 S. Ct. 473, 85 L. ed. 605; Pufahl, Receiver v. Estate of Parks, supra; McClaine v. Rankin, 197 U. S. 154, 25 S. Ct. 410, 49 L. ed. 702; Reich v. Van Dyke, supra.

In Pennsylvania the statute of limitations ordinarily ap-

[3] 28 U.S.C.A. 725.

plicable to actions founded upon a contract[4] requires that a suit be brought within a period of six years. This complaint was filed February 18, 1937, within the six year period. However, defendant contends that the applicable statute of limitations is the Act of June 26, 1895, P. L. 375, §1, 12 P. S. §39, a "borrowing" statute, which reverses the general rule of conflict of laws that an action not barred by the law of the forum can be maintained though it is barred in the state where it arose. The statute reads as follows: "When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this commonwealth."

Defendants urge that the cause of action arose in Kentucky and that since the Kentucky statute of limitations bars actions upon contracts not commenced within five years after the cause of action accrued[5], the five year Kentucky period is made applicable in this case by the Pennsylvania statute of 1895. The Kentucky statute applies to all actions in law or equity, The Auditor v. Hablert, 78 Ky. 577; Hargis v. Sewell's Administrator, 87 Ky. 63, and is controlling in a suit to recover the statutory assessment against national bank shareholders. Anderson v. Abbott, W. D. Ky., 23 F. Supp. 265. The ultimate issue thus becomes clearly defined. If plaintiff's cause of action arose in Kentucky, the five year Kentucky limitation, borrowed by the Pennsylvania Act of June 26, 1895, is controlling and the action must be dismissed. Mister v. Burkholder, 56 Pa. Super. 517; Bluefield S. S. Co., Ltd. v. United Fruit Co., 3rd Cir., 243 Fed. 1, writ of error dismissed, 248 U. S. 595, 39 S. Ct. 136, 63 L. ed. 438; see Mechanics Sav. Bank v.

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[4] Act of March 27, 1713, 12 P.S. §31.

[5] General Statutes Chap. 71, Art. III, Sec. 2, Kentucky Revised Statutes, Baldwin's 1943 Revision, Chap. 413, Sec. 413.120. This Kentucky statute of limitations bars actions upon contracts not in writing or actions upon liability created by statute not commenced within five years after the cause of action accrued.

Fidelity Insurance, Trust & Safe-Deposit Co., E. D. Pa., 91 Fed, 456.

A cause of action requires the existence of two basic elements—a primary right belonging to the plaintiff, and a wrong done by the defendant which is a breach of plaintiff's right resulting in damage. Shaffer's Estate, 228 Pa. 36. Where the cause of action is based upon a contract plaintiff must establish the existence of contractual rights between the parties and the defendant's performance of an act or failure to act which constitutes a breach thereof. Pond Creek Mill & Elevator Co. v. Clark, 7th Cir., 270 F. 482. The place where the breach occurs is the place where the cause of action arises. Baltimore & O. R. Co. v. Reed, 6th Cir., 223 Fed. 689. When the act or failure to act occurred which created the cause of action, the place where it occurred was the place of the breach and hence the place where the cause of action arose. The failure to act on April 1, 1931, which constituted the breach of contract and created the present cause of action, was defendants' failure to tender payment, as directed, to the receiver at his office in Louisville, Kentucky. Applying the legal principles set forth above, I must hold that the cause of action arose in the State of Kentucky, the place of performance of the contract. Auglaize Box Board Co. v. Kansas City Fiber Box Co., 6th Cir., 35 F. (2d) 822, certiorari denied, 281 U. S. 730, 50 S. Ct. 247, 74 L. ed. 1147. Plaintiff's contention that the cause of action arose in the United States and not in the State of Kentucky is based upon the fallacious assumption that the cause of action arose when the Comptroller of the Currency made the order of assessment and not upon defendants' failure to tender payment at the proper time and place.

Under the Pennsylvania Act of June 26, 1895, the law of the forum requires that plaintiff's remedial rights against defendants be controlled by the five year limitation period of Kentucky. The cause of action accrued in Kentucky on April 1, 1931 and was barred by the Kentucky five year

statute of limitations on April 1, 1936. Since this action was brought 323 days thereafter, it is barred by virtue of the Pennsylvania Act of June 26, 1895.

The complaint must be dismissed.

(s) GUY K. BARD,
Judge.

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JUDGMENT.

(Filed August 3, 1945.)

BEFORE BARD, J.

And Now, to wit: August 3, 1945, in accordance with the opinion of the court granting defendant's motions to dismiss, it is ordered that the above action be and the same is hereby dismissed, with costs.

By the Court:

Attest:

GILBERT A. LUDWIG,
Deputy Clerk.

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PETITION FOR REHEARING.

(Filed August 29, 1945.)

TO THE HONORABLE, THE JUDGES OF DISTRICT COURT:

The petition of A. M. Anderson, Receiver of the Bank of Kentucky, by his attorney, Joseph Marinelli, Esq., the plaintiff herein, respectfully represents:

*Petition for Rehearing*

1. That this proceeding was instituted in the District Court of the United States for the Eastern District of Pennsylvania by a Bill in Equity against stockholders living in the state of Pennsylvania.

2. That the defendants in the case, through their attorneys, filed motions to dismiss the Bill of Complaint. A number of reasons were assigned for dismissal of the bill, among which was the question of the statute of limitations.

3. That the motions to dismiss were argued before the Hon. Judge Bard. That at the time of the argument, the attorneys of record for the defendants, and the attorney for the plaintiff, agreed that all other reasons, with the exception of the statutes of limitations, should be abandoned.

4. That the Honorable Judge Bard, on August 3rd, 1945, filed an Opinion wherein he dismissed the complaint.

5. That the action of the court in dismissing the complaint was predicated on the fact that the court applied the Act of June 26th, 1895, P. L. 375, Sec. 1; 12th P. S. 39, a "borrowing statute", which reads as follows: "When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this Commonwealth."

6. That your petitioner is advised and believes that the question of the statute of limitations in its application to the present case was not fully presented to the court in view of the fact that your petitioner was faced with the problem of meeting the objections and reasons for dismissal of the complaint as outlined in the motions filed by about thirty defendants, and therefore, did not fully present the question of the statute of limitations with the force that the case required.

7. That it was only at the time of the argument on the motions to dismiss that the attorneys, as aforesaid, agreed to abandon all objections to the complaint and center their argument on the statute of limitations.

8. That your petitioner respectfully prays and urges that this petition for a re-hearing be granted, and that your petitioner be given leave to re-argue the case, and that this petition is well founded in law and in fact, and that the same is not presented for the purpose of delay but in good faith.

WHEREFORE upon the foregoing reasons, your petitioner respectfully prays that this petition for a re-hearing be granted so that your petitioner may submit for the consideration of your Honorable Court additional arguments regarding the applicability of the "borrowing statute of limitations" as hereinabove discussed, to the case at bar.

Respectfully submitted,

JOSEPH MARINELLI,
2440 Phila. Saving Fund Bldg.,
Philadelphia 7, Penna.,
Attorney for Petitioner.

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ORDER DENYING PETITION FOR REHEARING.

Sept. 11, 1945.

The within petition is denied.

(S) GUY K. BARD,
Judge.

## MOTION TO SUSPEND JUDGMENT.

(Filed Sept. 11, 1945.)

And Now, to wit: this day of August, A.D. 1945, on motion of Joseph Marinelli, Esq., attorney for the plaintiff in the above entitled case, the judgment entered in this case is hereby suspended pending a re-argument on motions to dismiss the complaint filed by the defendants, and the action of the Court to be taken following the re-argument of the issues in this case.

BY THE COURT:

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## ORDER DENYING MOTION TO SUSPEND JUDGMENT.

Sept. 11, 1945.
Motion Denied.
GUY K. BARD, Judge.

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## NOTICE OF APPEAL.

(Filed Oct. 3, 1945.)

Notice is hereby given to each of the defendants named in the above action that A. M. Anderson, Receiver of National Bank of Kentucky, an insolvent National Banking Association, hereby appeals to United States Circuit Court

of Appeals for the Third Circuit, from the judgment and order entered in this action on August 3rd, 1945, by Hon. Guy K. Bard, District Judge, dismissing the plaintiff's petition.

This appeal is taken by direction of the Comptroller of the Currency, a department of the Treasury of the United States.

A. M. ANDERSON,
Receiver,
National Bank of Kentucky.

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## STATEMENT OF POINTS RELIED ON UPON APPEAL.

(Filed Oct. 30, 1945.)

AND NOW comes, A. M. Anderson, Receiver of National Bank of Kentucky, defendant and appellant herein, and states that the points on which he intends to rely on appeal in this case are as follows:

1. The District Court erred in dismissing the petition in this case.

2. The District Court erred in holding that the action was not filed within the time prescribed by the applicable statute of limitations.

3. The District Court erred in holding that the cause of action arose in Kentucky.

ROBERT S. MARX,
HARRY KASFIR,
VINCENT C. VELDORALE,
JOHN GARAGUSO,
JOSEPH MARINELLI,
Counsel for Receiver,
National Bank of Kentucky.

## RECEIVER'S DESIGNATION OF PORTIONS OF THE RECORD TO BE CONTAINED IN THE RECORD ON HIS APPEAL.

(Filed Oct. 30, 1945.)

The plaintiff, A. M. Anderson, Receiver of the National Bank of Kentucky designates the following portions of the record and proceedings to be contained in the record on appeal in this action.

1. Bill of complaint filed February 18, 1937.
2. Amended and supplemental bill filed February 19, 1937.
3. Motion of Girard Trust Company, Trustee under deed of Jane Gray Glenn Childers, et al to dismiss bill of complaint filed March 11, 1937.
4. Motion of Mrs. Elizabeth S. Cope, et al, to dismiss bill of complaint filed March 13, 1937.
5. Motion of F. R. Cope, Jr., to dismiss bill of complaint filed March 13, 1937.
6. Answer of Hazel Berger and Mary E. Seaman filed March 19, 1937.
7. Motion by Fidelity-Philadelphia Trust Company Trustee under the will of Blanche E. Neide, deceased, to dismiss bill of complaint filed March 22, 1937.
8. Motion by A. Irvin Voss, et al, to dismiss bill of complaint filed March 24, 1937.
9. Answer of Stewart Morgan filed April 1, 1937.
10. Stipulation of counsel substituting Fidelity-Philadelphia Trust Company, Trustee under the will of Blanche E. Neide, filed May 18, 1937.
11. Motion to dismiss filed by E. B. Morris, Jr., et

al, doing business under the name of Steere & Co., filed August 28, 1944.

12. Motion of Girard Trust Company, trustee under deed of Jane Childers filed Aug. 28, 1944.

13. Motion of Julia DuPont Andrews to dismiss bill of complaint filed March 6, 1945.

14. Motion of Francis R. Cope, Jr., to dismiss filed March 27, 1945.

15. Motion of plaintiff for summary judgment filed May 8, 1945.

16. Opinion by Judge Guy K. Bard filed August 3, 1945.

17. Judgment dismissing action filed August 3, 1945.

18. Petition for rehearing filed August 29, 1945, together with Court's notation denying that petition filed September 11, 1945.

19. Motion to suspend judgment together with tendered order relative to same with Court's notation denying said motion filed September 11, 1945.

20. Plaintiff's notice of appeal.

21. Plaintiff's statement of points which he will rely upon on appeal.

22. This designation of record on appeal.

23. Clerk's certificate to transcript of record on appeal.

ROBERT S. MARX,
HARRY KASFIR,
VINCENT C. VELDORALE,
JOHN GARAGUSO,
JOSEPH MARINELLI,
Attorneys for A. M. Anderson, Receiver of the National Bank of Kentucky.

## ORDER AMENDING OPINION AS FILED AUGUST 3, 1945.

(Filed Aug. 3, 1945.)

AND NOW, to wit, this 15th day of November, 1945, the opinion in the above entitled cause filed August 3, 1945, is amended as follows:

By inserting the words "brought in Kentucky" between the words "suit" and "to" on the 12th line of page 8;

By inserting after the period following the word "place" in the 11th line of page 10 the following sentence, "Since the cause of action has been fully barred by the limitation laws of Kentucky, the state in which it arose, the Pennsylvania 'borrowing' statute makes the Kentucky statute of limitations operative as the applicable limitation law of the forum";

By striking the words "Under the Pennsylvania Act of June 26, 1895, the law of the forum", beginning on the 12th line of page 10, and inserting in lieu thereof the words "The Pennsylvania Act of June 26, 1895 borrows the Kentucky limitation statute which becomes the limitation law of the forum for the purposes of this case, and".

(Sgd.) GUY K. BARD,
Judge.

[fol. 57a] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1945

No. 9081

A. M. ANDERSON, Receiver of the National Bank of Kentucky, Plaintiff-Appellant,

vs.

MRS. JULIA DUPONT ANDREWS, et al., FIDELITY-PHILA. TRUST Co., Trustee, etc., et al., Girard Trust Co., Trustee, etc., et al.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

ORDER ASSIGNING HON. HARRY E. KALODNER FOR ARGUMENT—Filed May 24, 1946

And now, to-wit: this 24th day of May, A. D. 1946, it is ordered that Hon. Harry E. Kalodner, District Judge for the Eastern District of Pennsylvania, be, and he is hereby assigned to sit in above case in order to make a full court.

Goodrich, Circuit Judge.

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[fol. 58a] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1945

No. 9081

A. M. ANDERSON, Receiver of the National Bank of Kentucky, Appellant,

v.

MRS. JULIA DU PONT ANDREWS; MRS. HAZEL BERGER; Katherine N. Bradford; William Bradford; Mrs. Nellie Sanders Brooks; James Glen Childers; Mrs. Elizabeth S. Cope; Francis R. Cope, Jr.; Fidelity-Philadelphia Trust Company, Substitute Trustee for Charles N. Davis, under the Will of Charles W. Poultney, Dec'd.; Charles N. Davis; Girard Trust Company, Trustee u/d Jane Gray Glen Childers; Jane Gray Glen Childers;

Girard Trust Company, Trustee Clementine Cope and Annette Cope Memorial Fund; Girard Trust Company, Trustee u/d James Lyle Glenn; James Lyle Glenn; Gottlieb Grauf; Joseph F. Gunster; James D. Harlan; Catherine B. Heyer; Harriet Heyer, Executrix of the Estate of Edward G. Heyer, Dec'd.; Harriet Heyer, Distributee of the Estate of Edward G. Heyer, Dec'd.; Mrs. Harriet Heyer; Miss Grace A. Hillenmeyer; Leicester B. Holland; Mrs. Louise Adams Holland; Rupert S. Holland; Newton Linville; R. Courtenay Loving; Carolina S. McCowan; Stewart Morgan; Miss Blanche E. Neide; Jesse Pilson; Mrs. Elsa Neide Brooke Pridgen; Mrs. Lucy S. Putnam; Charles Roland; Elizabeth C. Rolph; Mrs. Mary E. Seaman; Fidelity-Philadelphia Trust Company, Agent for Mrs. Rebecca B. Willing Spencer; Mrs. Rebecca B. Willing Spencer; Joseph J. Tunney; Robert D. Christie, Executor of the Estate of Pauline W. Christie, Dec'd.; Robert D. Christie, Distributee of the Estate of Pauline W. Christie, Dec'd.; Mary Christie Weyer, Distributee of the Estate of Pauline W. Christie, Dec'd.; John W. Christie, Distributee of the Estate of Pauline W. Christie, Dec'd.; Jonathan M. Steere, Gilbert L. Bishop, Jr., E. B Morris, Jr., George H. Stuart, III, and Thomas S. Hopkins, Partners, Trading and Doing Business under the Firm Name and Style of Steere & Company, Martha R. Blessing; A. Irvin Voss; Lena Schmidte; Fidelity-Philadelphia Trust Company, Trustee u/w Blanche E. Neide, Deceased

[fol. 59a] Appeal from the Judgment and Order of the United States District Court for the Eastern District of Pennsylvania

Argued May 24, 1946

Before Goodrich and McLaughlin, Circuit Judges and Kalodner, District Judge

Opinion of the Court—Filed August 13, 1946

By Goodrich, Circuit Judge:

This is a suit by the receiver of a defunct national bank to recover against shareholders their liability upon

an assessment.[1] The suit was brought against the shareholders in the federal court for the Eastern District of Pennsylvania. It was begun more than five years and less than six years after the cause of action had accrued.[2] [fol. 60a] These dates present the significant facts for the application of a rule of law to the one disputed question on this appeal. There is no federal statute of limitations limiting the time in which shareholders' liability in a national bank may be enforced. The local law of limitations,

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[1] This suit by the receiver of a defunct national bank, which was located in Kentucky, was instituted against the shareholders of a Delaware bank-stock company (Banco Kentucky Company). Stock of the national bank had been held by trustees. The trustees had issued trust participation certificates in exchange for the national bank stock. The trust participation certificates were exchanged later for stock of the Banco Kentucky Company. The receiver of the national bank had obtained a $4,000,000 judgment against Banco Kentucky Company because of a double liability assessment upon the national bank shares. Laurent v. Anderson, 70 F. (2d) 819 (C. C. A. 6, 1934). Some $90,000 was paid upon the judgment by the Banco Kentucky Company. The receiver then instituted personal suits against numerous shareholders of Banco to recover the balance of the $4,000,000 judgment. Anderson v. Abbott, 321 U. S. 349 (1944), presented a thorough analysis of the corporate relations and established the individual liability of the shareholders of Banco for the assessment upon the national bank stock. We discuss the problem of the instant case, therefore, as though the defendants had been individual shareholders from the outset.

[2] The National Bank of Kentucky failed on November 16, 1930. The United States Comptroller of Currency levied an assessment of $4,000,000 upon the shareholders on February 20, 1931. April 1, 1931 was set by the Comptroller as the final date for payment of the assessment. Rawlings v. Ray, 312 U. S. 96 (1941) decided that the statute of limitations is to run from the date set for payment of the assessment, here April 1, 1931. February 18, 1937 was the date of filing of the instant suit.

therefore, is applicable.[3] The applicable statute of limitations in Pennsylvania is six years.[4] But Pennsylvania, along with the majority of other states, has a "borrowing" statute.[5] The borrowing provision reads as follows:

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[3] When there is no federal statute of limitations and litigation occurs in a federal court the following situations may arise:

a. If the litigation is a law suit the state statute of limitations of the state where the cause of action arose will govern. Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U. S. 390 (1906); Campbell v. Haverhill, 15 U. S. 610 (1895).

b. If the litigation is solely in equity the federal courts may adopt similar state equity limitations. Benedict v. City of New York, 250 U. S. 321 (1919). The federal courts are not bound, however, to adopt state criteria and apply them by analogy. Russell v. Todd, 309 U. S. 280, 288, n. 1 (1940).

c. If litigation is solely in equity and the state wherein the cause of action arose has no analogous equitable action the federal courts will use the doctrine of laches. Speidel v. Henrici, 120 U. S. 377 (1887); Wagner v. Baird, 7 How. 234 (1849).

d. If the litigation in equity is to aid a legal right equity will withhold its remedy if the legal right is barred by a local statute of limitation. Russell v. Todd, 309 U. S. 280, 289 (1940); McDonald v. Thompson, 184 U. S. 71 (1902); Wilson v. Koontz, 7 Cranch 202 (1812).

e. If the litigation involves facts where there is concurrent equity jurisdiction the statute of limitations that bars the legal right also bars recovery in a suit in equity. Guaranty Trust Co. v. York, 326 U. S. 99 (1945); Overfield et al. v. Pennroad Corporation, 146 F. (2d) 889 (C. C. A. 3, 1944).

[4] ". . . all actions of debt, . . . which shall be sued or brought . . . shall be commenced and sued . . . within six years next after the cause of such actions or suit, and not after. . . ." Act of March 27, 1713, 1 Sm. L. 96, § 1; 12 P. S. Sec. 31.

[5] See the discussion: Legislation Governing the Applicability of Foreign Statutes of Limitation (1935), 35 Col. L. Rev. 762.

"When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this Commonwealth."[6]

This moves us to the question in the case. The Kentucky period of limitations applicable to such an action as [fol. 61a] this is five years.[7] The national bank, whose shareholders are now being sued, had its principal banking office in the City of Louisville, Kentucky.[8] The defendants say that the Pennsylvania borrowing statute protects them from suit in a federal court in Pennsylvania. The theory of the defense is that this cause of action arose in Kentucky. By the statute of limitations of Kentucky the action was brought too late, it having been commenced, as already stated, more than five years after the liability accrued. The terms of the Pennsylvania borrowing statute, therefore, they say, became applicable and the suit is brought too late here.[9]

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[6] Act of June 26, 1895, P. L. 375, § 1; 12 P. S. Sec. 39.

[7] "An action upon a contract not in writing, signed by the party, express or implied; an action upon a liability created by statute, when no other time is fixed by the statute creating the liability * * * shall be commenced within five years next after the cause of action accrued." General Statutes, Chap. 71, Art. III, Sec. 2; Kentucky Revised Statutes, Baldwin's 1930 Revision, Chap. 80, Sec. 2515. This was subsequently changed in form to read: "Actions to be brought within five years. The following action shall be commenced with five years after the cause of action accrued:

(1) An action upon a contract not in writing, expressed or implied.

(2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability. * * *" Kentucky Revised Statutes, Sec. 413.120 (2nd Ed., 1944).

[8] It had ceased to do business at the time the assessment upon shareholders was made.

[9] Note that the Pennsylvania borrowing statute provides a defense to an action "brought in any of the courts of this Commonwealth." It could be urged, perhaps, that the borrowing statute is, by its terms, not applicable because the

The theory upon which the defendants urge that this action arose in Kentucky is something like this. The liability of the shareholders to pay an assessment upon stock is contractual in its nature. This contract was performable at the office of the Receiver at his stated address in the City of Louisville, Kentucky, because that is really where the Receiver's notice to shareholders indicated that payments should be made. The cause of action for breach of contract arises under the law of the place where the promisor had a duty to perform and failed to perform. Since [fol. 62a] that place was the specified office building in Louisville, the cause of action arose there just as the cause of action in tort would arise under the law of the place of wrong. There are authorities which, applying these borrowing statutes, follow the rules suggested as to the place of claim for breach of contract and tort.[10]

This argument is all right if it is said quickly without parsing it. But we do not think that it is accurate as a matter of legal analysis to say that a shareholder's liability on his stock is contractual.[11] The unfortunate shareholder does not promise to pay a shareholder's liability equal to the par value of his stock if the bank fails. The obligation is imposed on him by law. Perhaps it can be called "quasi contractual" if that helps to distinguish it from liability based upon intentional or negligent misconduct. But this fact does not make a suit to enforce the shareholder's lia-

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United States District Court is not a court of the Commonwealth of Pennsylvania. We make nothing of this point, however, because we think the case ought to be settled on the broader ground than verbal hair-splitting.

[10] Cases involving breach of contract: Auglaize Box Board Co. v. Kansas City Fibre Box Co., 35 F. (2d) 822 (C. C. A. 6, 1930), cert. den. 281 U. S. 730 (1930); Pond Creek Mill & Elevator Co. v. Clark, 270 Fed. 482 (C. C. A. 7, 1920). Case involving a tort: Baltimore & Ohio RR. Co. v. Reed, 223 Fed. 689 (C. C. A. 6, 1915), cert. den. 239 U. S. 640 (1915). Notes (1931) 75 A. L. R. 211; Restatement, Conflict of Laws (1934) § 604, comment b; 11 Am. Jur., Conflict of Laws, § 197; Goodrich, Conflict of Laws (2d ed. 1938) 202.

[11] McClaine v. Rankin, 197 U. S. 154, 161 (1905) McDonald v. Thompson, 184 U. S. 71, 73, 74 (1902).

bility the enforcement of a promise made by the shareholder. Nor are we satisfied that when the Receiver named his office as the place where checks could be sent to pay this assessment that this made the office the "place of performance." The recipient of the payment was really not the Receiver but the Comptroller General of the United States who, obviously, is not located in Kentucky.[12] Even on defendants own theory, therefore, we find it hard to see that [fol. 63a] the facts of their case fit the legal rule on which they base immunity.

There is a wider ground, however, on which we think the defendants are wrong and which compels a reversal of the judgment of the District Court. The approach, we think, is found in the language of Mr. Justice Frankfurter speaking for the Court in Holmberg, et al. v. Armbrecht, et al., U. S. , decided February 25, 1946. In the case which involved liability of shareholders in the Southern Minnesota Joint Stock Land Bank he said: "We do not have the duty of a federal court, sitting as it were as a court of State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress." In our case the liability imposed upon the shareholders of national banks for the benefits of their creditors is not a state created right, but one created by United States statute. The liability extends to all shareholders regardless of the state where the bank has its principal place of business and regardless of where shareholders live. In dealing with it the rules applicable are not those in which a federal court, sitting in a diversity case,

[12] Whenever the Comptroller becomes satisfied of the insolvency of a national bank he has the statutory power to appoint a receiver. 19 Stat. 63 (1876), 12 U. S. C. A. § 191. The receiver is the representative of the Comptroller. United States v. Weitzel, 246 U. S. 533, 541 (1918); Lehman v. Spurway, 58 F. (2d) 227, 228 (C. C. A. 5, 1932). The receiver is under the direction of the Comptroller and may enforce individual liability and is charged with the duty to pay all money over to the Treasurer of the United States, subject to the order of the Comptroller. 13 Stat. 114 (1864), 12 U. S. C. A. §192.

applies state law as accurately as it can. It is, rather, one of those instances where federal courts are enforcing rights arising out of transactions governed by the federal government acting within its constitutional field. Ordinary state rules of law are not applicable to create or to limit the claim.[13] We think, therefore, that this is not the kind of cause of action which is properly described as arising within the State of Kentucky. It did not arise there any more than it did in any other one of the states of the [fol. 64a] United States.[14] We conclude, therefore, that the borrowing provision of the Pennsylvania statute of limitations is not applicable. It is not disputed that the action is timely brought unless the borrowing statute may be availed of to bar it. The conclusion necessarily follows, therefore, that it may be maintained, so far as the time element is concerned and this is the only point up for our decision at this time.

In reaching this conclusion we are quote conscious that we are in disagreement with our brethren of the Sixth Circuit in the decision they reached in Helmers, et al. v. A. M. Anderson, F. (2d) (C. C. A. 6, 1946), a case decided since the submission of the one at bar. We have read the carefully prepared opinion in that case, but are still constrained to follow the view of the matter which we have expressed above.

The judgment of the District Court is reversed and the case remanded for further proceedings in conformity with this opinion.

---

[13] Cf. Herget, Trustee in Bankruptcy v. Central National Bank & Trust Co., 324 U. S. 4, 9 (1945). Accord, D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation, 315 U. S. 447 (1942) (Note especially Mr. Justice Jackson's concurring opinion at pp. 465-475).

[14] It is, of course, true that statutes passed within constitutional authority by the Congress become a part of "the law" in Kentucky and in other states because the laws of the United States become "the supreme law of the land".

[fols. 65a-67a] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1945

No. 9081

A. M. ANDERSON, Receiver of the National Bank of Kentucky, Appellant,

vs.

JULIA DUPONT ANDREWS, et al.

JUDGMENT—Filed August 13, 1946

Present: Goodrich and McLaughlin, Circuit Judges, and Kalodner, District Judge

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the cause is remanded for further proceedings in conformity with the opinion of this court.

By the Court, Goodrich, Circuit Judge.

August 13, 1946.

[File endorsement omitted]

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[fols. 68a-74a] Petition for Rehearing covering 5 pages filed Aug. 27, 1946, omitted from this print. It was Denied, and nothing more by order of Sept. 10, 1946.

[fol. 75a] In the United States Circuit Court of Appeals for the Third Circuit

[Title omitted]

Order Denying Petition for Rehearing—Filed September 10, 1946

And Now, to wit September 10, 1946, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, —— ——.

Goodrich, Circuit Judge.

[fol. 76a] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 77a] Supreme Court of the United States

Order Allowing Certiorari—Filed December 9, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

IN THE

# Supreme Court of the United States

No. 593

October Term, 1946.

FRANCIS R. COPE, JR.,

*Petitioner,*

v.

A. M. ANDERSON, Receiver of the National Bank of Kentucky,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

DAVID A. HERR,
JOHN WINTERSTEEN,
HAROLD EVANS,
Philadelphia, Pa.,
*Counsel for Petitioner.*

Martin & Lyle, 404 Penfield Bldg., Phila., Pa.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

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No. October Term, 1946.

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FRANCIS R. COPE, JR.,

*Petitioner,*

v.

A. M. ANDERSON, Receiver of the National Bank of Kentucky,

*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

---

*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, Francis R. Cope, Jr., respectfully prays that a writ of certiorari be granted to remove into your Honorable Court for review a judgment of the Circuit Court of Appeals for the Third Circuit entered August 13, 1946, reversing a judgment of the United States District Court for the Eastern District of Pennsylvania in favor of the petitioner above named.

## I. SUMMARY STATEMENT OF THE MATTER INVOLVED.

### (a) The Judgments Below.

The United States District Court for the Eastern District of Pennsylvania on August 3, 1945 entered judgment (R. 49a) granting petitioner's motion to dismiss in accordance with the opinion of the court (R. 43a) filed the same day. The opinion of the District Court is reported in 62 F. Supp. 705 (D. C. Pa., 1945). The opinion of the Circuit Court of Appeals (R. 58a-64a) reversing the judgment of the District Court has not been reported.

### (b) Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on August 13, 1946 (R. 65a). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

### (c) The Questions Presented.

(1) Is the suit barred by the Pennsylvania Act of June 26, 1895, a part of the general limitation law of the forum, which "borrows" the limitation period of the State where the cause of action arose?

(2) Does the limitation law of the forum apply in an action by a receiver of a national bank to enforce the double liability of its shareholders, which liability has its origin in a federal statute?

(3) When the receiver of a national bank, in accordance with an assessment made by the Comptroller of the Currency, directs the shareholders of that bank to pay the assessment to him at his office on or before a specified date, does the cause of action arise and accrue *when* payment is not so made and *where* the shareholder was directed and had the duty to make the payment?

**(d) The Statutes Involved.**

Section 12 of the National Bank Act:

> "The shareholders of every national banking association shall be held individually responsible, equally and ratably and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares * * *" (Rev. Stat. §5151, 12 U. S. C. §63; derived from Act of June 3, 1864, c. 106, §12, 13 Stat. 102.)

Section 23 of the Federal Reserve Act:

> "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. * * *" (38 Stat. 273, 12 U. S. C. §64.)

The Pennsylvania Act of June 26, 1895:

> "When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this commonwealth."

(Act of June 26, 1895, P. L. 375, §1, 12 Purd. Stat. §39.)

The Kentucky Statute of Limitations:

"An action upon a contract not in writing, signed by the party, express or implied; an action upon a liability created by statute, when no other time is fixed by the statute creating the liability * * * shall be commenced within five years next after the cause of action accrued." (General Statutes, Chap. 71, Art. III, Sec. 2; Kent. Rev. Stat., Baldwins 1930 Rev., Chap. 80, Sec. 2515.)

The District of Columbia Code (1940 ed.), Section 12-201:

"No action shall be brought * * * upon any simple contract, express or implied * * * after three years from the time when the right to maintain any such action shall have accrued; nor for any statutory penalty or forfeiture * * * after one year from the time when the right to maintain any such action shall have accrued; and no action the limitation of which is not otherwise specially prescribed in this section shall be brought after three years from the time when the right to maintain such action shall have accrued.* * *" (Act of March 3, 1901, 31 Stat. 1389, Chap. 854, §1265; Act of June 30, 1902, 32 Stat. 542, Chap. 1329.)

### (c) Statement of Facts.

Respondent is Receiver of the National Bank of Kentucky ("The Bank") (R. 5a), a national banking association domiciled at Louisville, Jefferson County, in the Western District of Kentucky (R. 4a).

Petitioner is a shareholder of The BancoKentucky Com-

pany ("Banco") (R. 21a), a financial corporation organized under the laws of the State of Delaware (R. 12a).

On April 22, 1927, the shareholders of The Bank, together with the shareholders of Louisville Trust Company, transferred their shares of both institutions to six trustees and received for them participation certificates. The trustees were the record owners of all shares of both banks and the participation certificate holders were the real and beneficial owners (R. 8a-9a). In 1929 the holders of participation certificates transferred their certificates to Banco in exchange for Banco shares.

On November 17, 1930 the Comptroller of the Currency appointed a receiver of The Bank and on February 20, 1931, levied 100% assessment against its shareholders (R. 4a, 17a). In March, 1931, the Receiver, "acting pursuant to the authority and direction of the Comptroller of the Currency," notified Banco shareholders that demand had been made upon Banco for the payment of the assessment and that if he did not succeed in collecting from Banco he intended to proceed against the said Banco shareholders (R. 17a). The notice stated in part:

> "As a stockholder in the BancoKentucky Company, you will please take notice, that the *Comptroller of the Currency has* on February 20, 1931, *levied an assessment* upon the stockholders of The National Bank of Kentucky, Louisville, Ky., on the par value of each and every share, *payable at the Office of the Receiver* (Louisville, Kentucky) on or before April 1, 1931." (Parenthesis and italics added.)

In October, 1931, the Receiver of The Bank sued Banco for the assessment as the holder of substantially all of The Bank's shares (R. 18a) and obtained a judgment which was affirmed on appeal: *Laurent v. Anderson*, 70 F. (2d) 819 (C. C. A. 6th, 1934). $90,745.17 was paid on that judgment (R. 19a).

On February 17, 1936, A. M. Anderson, substituted re-

ceiver of The Bank, started an action in the United States District Court for the Western District of Kentucky against certain stockholders of Banco: [*Anderson v. Abbott, et al.*, 32 F. Supp. 328 (D. C. Ky., 1940)]. On March 23, 1940, the District Court handed down an opinion dismissing the action. The United States Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court: [*Anderson v. Abbott, et al.*, 127 F. (2d) 696 (C. C. A. 6th, 1942)].

This Court in a five to four decision on March 6, 1944, reversed the two courts below: [*Anderson v. Abbott, et al.*, 321 U. S. 349 (1944)].

A. M. Anderson, Receiver of The Bank, began the Pennsylvania phase of this litigation by filing suit against petitioner and other stockholders of Banco in the District Court of the United States for the Eastern District of Pennsylvania on February 18, 1937 (R. 1a), five years and 323 days after the cause of action arose. Petitioner filed a motion to dismiss on the ground, inter alia, that the action was barred under the Pennsylvania "borrowing" statute of limitations (Act of June 26, 1895) (R. 42a). Further proceedings were postponed pending the outcome of the proceedings instituted in the District Court of the United States for the Western District of Kentucky in the case of *Anderson v. Abbott, et al.* (outlined *supra*). The District Court for the Eastern District of Pennsylvania in an opinion by District Judge Bard, filed August 3, 1945, held that the action was barred and dismissed the complaint (R. 43a-49a). On October 3, 1945, the receiver filed his appeal in the Circuit Court of Appeals for the Third Circuit. On August 13, 1946, the said Circuit Court of Appeals reversed the judgment of the District Court. On August 27, 1946, petitioner filed a petition for rehearing which was denied by the Circuit Court of Appeals for the Third Circuit on September 10, 1946.

## II. REASONS RELIED ON FOR ALLOWANCE OF WRIT.

(1) The decision of the Circuit Court of Appeals for the Third Circuit, a review of which is sought, is in direct conflict with the decision rendered by the Circuit Court of Appeals for the Sixth Circuit in the case of *Lawrence S. Helmers, et al. v. A. M. Anderson, Receiver of the National Bank of Kentucky*, 156 F. (2d) 47 (C. C. A. 6th, 1946) (decided June 24, 1946; rehearing denied August 19, 1946). The *Helmers* case was an action by the same Receiver against certain shareholders of Banco who are residents of Ohio. In that case a motion to dismiss based on an Ohio "borrowing" statute very similar to the Pennsylvania "borrowing" statute was granted. Counsel for the Receiver has indicated that the Receiver will petition this Court for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit.

(2). The decision of the Circuit Court of Appeals for the Third Circuit, a review of which is sought, is in conflict with applicable decisions of this Court in that: (a) it refuses to apply the limitation law of the forum in accordance with the decisions in *Fisher v. Whiton*, 317 U. S. 217 (1942) and *Rawlings v. Ray*, 312 U. S. 96 (1941); (b) it applies to this case, where there is concurrent jurisdiction in law and equity, decisions applicable only where the sole remedy is in equity and is inconsistent with the decision in *Russell v. Todd*, 309 U. S. 280 (1940). The judgment of the court below is also inconsistent in principle with the decisions in *Brown v. O'Keefe*, 300 U. S. 598 (1937); *Chisholm v. Gilmer*, 299 U. S. 99 (1936); *Bernheimer v. Converse*, 206 U. S. 516 (1907); and *Platt v. Wilmot*, 193 U. S. 602 (1904).

WHEREFORE your petitioner prays that this petition be granted and that a writ of certiorari issue to review the

judgment of the Circuit Court of Appeals for the Third Circuit entered August 13, 1946.

DAVID A. KERR,

JOHN WINTERSTEEN,

Harold Evans

HAROLD EVANS,

Philadelphia, Pa.,
*Counsel for Petitioner.*

FILE COPY

IN THE

# Supreme Court of the United States

## No. 593.

**October Term, 1946.**

FRANCIS R. COPE, JR.,

*Petitioner,*

*v.*

A. M. ANDERSON, Receiver of the National Bank of Kentucky,

*Respondent.*

# BRIEF FOR PETITIONER.

DAVID A. KERR,
JOHN WINTERSTEEN,
HAROLD EVANS,
Philadelphia, Pa.,
*Counsel for Petitioner.*

*Of Counsel:*
MacCoy, Brittain, Evans & Lewis,
Ballard, Spahr, Andrews & Ingersoll.

International, 236 Chestnut St., Phila., Pa.

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IN THE

# Supreme Court of the United States.

No. 593. OCTOBER TERM, 1946.

FRANCIS R. COPE, JR.,

*Petitioner,*

*v.*

A. M. ANDERSON, RECEIVER OF THE NATIONAL BANK OF KENTUCKY,

*Respondent.*

## BRIEF FOR PETITIONER.

### THE DECISIONS BELOW.

The United States District Court for the Eastern District of Pennsylvania on August 3, 1945 entered judgment (R. 49a) granting petitioner's motion to dismiss in accordance with the opinion of the court (R. 43a) filed the same day. The opinion of the District Court is reported in 62 F. Supp. 705 (D. C. Pa., 1945). The opinion of the Circuit Court of Appeals (R. 58a-64a) reversing the judgment of the District Court is reported in 156 F. (2d) 972 (C. C. A. 3rd, 1946).

### JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on August 13, 1946 (R. 65a). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### THE QUESTIONS PRESENTED.

(1) Is the suit barred by the Pennsylvania Act of June 26, 1895, a part of the general limitation law of the forum, which "borrows" the limitation period of the State where the cause of action arose?

(2) Does the limitation law of the forum apply in an action by a receiver of a national bank to enforce the double liability of its shareholders, which liability has its origin in a federal statute?

(3) When the receiver of a national bank, in accordance with an assessment made by the Comptroller of the Currency, directs the shareholders of that bank to pay the assessment to him at his office on or before a specified date, does the cause of action arise and accrue *when* payment is not so made and *where* the shareholder was directed, and had the duty, to make the payment?

## SPECIFICATIONS OF ERROR.

1. The Third Circuit Court of Appeals erred in reversing the decision of the District Court.

2. The Third Circuit Court of Appeals erred in holding respondent's cause of action did not arise in Kentucky.

## THE STATUTES INVOLVED.

*Section 12 of the National Bank Act:*

"The shareholders of every national banking association shall be held individually responsible, equally and ratably and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares * * *" (Rev. Stat. § 5151, 12 U. S. C. § 63; derived from Act of June 3, 1864, c. 106, § 12, 13 Stat. 102.)

*Section 23 of the Federal Reserve Act:*

"The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value

thereof in addition to the amount invested in such stock. * * *" (38 Stat. 273, 12 U. S. C. § 64.)

*The Pennsylvania Act of June 26, 1895:*

"When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this commonwealth."

(Act of June 26, 1895, P. L. 375, § 1, 12 Purd. Stat. § 39.)

*The Kentucky Statute of Limitations:*

"An action upon a contract not in writing, signed by the party, express or implied; an action upon a liability created by statute, when no other time is fixed by the statute creating the liability * * * shall be commenced within five years next after the cause of action accrued." (General Statutes, Chap. 71, Art. III, Sec. 2; Kent. Rev. Stat., Baldwins 1930 Rev., Chap. 80, Sec. 2515.)

*The District of Columbia Code (1940 ed.), Section 12-201:*

"No action shall be brought * * * upon any simple contract, express or implied * * * after three years from the time when the right to maintain any such action shall have accrued; nor for any statutory penalty or forfeiture * * * after one year from the time when the right to maintain any such action shall have accrued; and no action the limitation of which is not otherwise specially prescribed in this section shall be brought after three years from the time when the right to maintain such action shall have accrued. * * *" (Act of March 3, 1901, 31 Stat. 1389, Chap. 854, § 1265; Act of June 30, 1902, 32 Stat. 542, Chap. 1329.)

## STATEMENT OF FACTS.

Respondent is Receiver of the National Bank of Kentucky ("The Bank") (R. 5a), a national banking association domiciled at Louisville, Jefferson County, in the Western District of Kentucky (R. 4a).

Petitioner is a shareholder of The BancoKentucky Company ("Banco") (R. 21a), a financial corporation organized under the laws of the State of Delaware (R. 12a).

On April 22, 1927, the shareholders of The Bank, together with the shareholders of Louisville Trust Company, transferred their shares of both institutions to six trustees and received for them participation certificates. The trustees were the record owners of all shares of both banks and the participation certificate holders were the real and beneficial owners (R. 8a-9a). In 1929 the holders of participation certificates transferred their certificates to Banco in exchange for Banco shares.

On November 17, 1930 the Comptroller of the Currency appointed a receiver of The Bank and on February 20, 1931, levied 100% assessment against its shareholders (R. 4a, 17a). In March, 1931, the Receiver, "acting pursuant to the authority and direction of the Comptroller of the Currency," notified Banco shareholders that demand had been made upon Banco for the payment of the assessment and that if he did not succeed in collecting from Banco he intended to proceed against the said Banco shareholders (R. 17a). The notice stated in part:

> "As a stockholder in the BancoKentucky Company, you will please take notice, that the *Comptroller of the Currency has* on February 20, 1931, *levied an assessment* upon the stockholders of The National Bank of Kentucky, Louisville, Ky., on the par value of each and every share, *payable at the Office of the Receiver* (Louisville, Kentucky) on or before April 1, 1931." (Parenthesis and italics added.)

In October, 1931, the Receiver of The Bank sued Banco for the assessment as the holder of substantially all of The Bank's shares (R. 18a) and obtained a judgment which was affirmed on appeal: *Laurent v. Anderson,* 70 F. (2d) 819 (C. C. A. 6th, 1934). $90,745.17 was paid on that judgment (R. 19a).

On February 17, 1936, A. M. Anderson, substituted receiver of The Bank, started an action in the United States District Court for the Western District of Kentucky against certain stockholders of Banco: *Anderson v. Abbott, et al.,* 32 F. Supp. 328 (D. C. Ky., 1940). On March 23, 1940, the District Court handed down an opinion dismissing the action. The United States Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court: *Anderson v. Abbott, et al.,* 127 F. (2d) 696 (C. C. A. 6th, 1942).

This Court in a five to four decision on March 6, 1944, reversed the two courts below: *Anderson v. Abbott, et al.,* 321 U. S. 349 (1944).

A. M. Anderson, Receiver of The Bank, began the Pennsylvania phase of this litigation by filing suit against petitioner and other stockholders of Banco in the District Court of the United States for the Eastern District of Pennsylvania on February 18, 1937 (R. 1a), five years and 323 days after the cause of action arose. Petitioner filed a motion to dismiss on the ground, inter alia, that the action was barred under the Pennsylvania "borrowing" statute of limitations (Act of June 26, 1895) (R. 42a). Further proceedings were postponed pending the outcome of the proceedings instituted in the District Court of the United States for the Western District of Kentucky in the case of *Anderson v. Abbott, et al.* (outlined *supra*). The District Court for the Eastern District of Pennsylvania in an opinion by District Judge Bard, filed August 3, 1945, held that the action was barred and dismissed the complaint (R. 43a-49a). On October 3, 1945, the receiver filed his appeal in the Circuit Court of Appeals for the Third Circuit. On

August 13, 1946, the said Circuit Court of Appeals reversed the judgment of the District Court. On December 9, 1946 the Petition for Writ of Certiorari filed by Francis R. Cope, Jr. (with the understanding that the decision as to the statute of limitation would be binding on all parties in the court below) was granted by this Court.

## ARGUMENT.

### A. The Applicable Statute of Limitations Is the Pennsylvania Act of 1895 Which Borrows the Kentucky Statute.

Statutes of limitation are procedural in nature and the policy expressed by such statutes prohibits the maintenance of an action in the courts of the forum after the lapse of the prescribed period. In any discussion of conflict of laws it is axiomatic that the law of the forum governs so far as the limitation of actions is concerned: *Rawlings v. Ray*, 312 U. S. 96 (1941); *Pufahl v. Parks*, 299 U. S. 217 (1936); *McClaine v. Rankin*, 197 U. S. 154 (1905); *Platt v. Wilmot*, 193 U. S. 602 (1904).

The forum in the instant proceeding is the State of Pennsylvania. The Pennsylvania limitation law contains the following statutory provision:

> "When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this Commonwealth." [Act of June 26, 1895, P. L. 375 § 1 (12 P. S. § 39)].

This type of statute which adopts as its own period of limitation the period of limitation of the place where the cause of action arose is generally referred to as a "borrowing" statute. Statutes of this nature have been adopted in most of the States in the Union. In Pennsylvania, as in other States which have enacted such statutes, the "borrowing" statute is a part of the general limitation law and in the instant proceeding it is the applicable limitation law of the forum. The Act of June 26, 1895, *supra*, is applied by the courts of Pennsylvania when the cause of action arose outside of the state: *Mister v. Burkholder*, 56 Pa. Super. 517 (1914); *Fletcher's Estate*, 45 D. & C. 673 (1942).

The constitutionality of "borrowing" statutes has been upheld by this Court in the case of *Canadian Northern Ry. Co. v. Eggen*, 252 U. S. 553 (1920).

*When, as in the case at bar, equity jurisdiction is concurrent with that at law and the suit is brought in aid of a legal right, the Federal Courts apply the applicable state statute of limitations.*

> "Even though there is no state statute applicable to similar equitable demands, when the jurisdiction of the federal court is concurrent with that at law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations." *Russell v. Todd*, 309 U. S. 280, 289 (1940).

> "Where the suit is brought in equity and is not in aid or support of a legal right, the jurisdiction on the equity side is said to be 'exclusive' and the limitation period applicable is determined by the doctrine of laches as applied in federal courts, assuming that there is no local statute applicable to suits in equity. Where, however, the jurisdiction of equity is 'concurrent' with that at law or the suit is brought in aid of a legal right, the state statute of limitations applicable to legal remedies and rights will be applied in the equity suit." *Overfield, et al. v. The Pennroad Corporation, et al.*, 146 F. (2d) 889, 892 (C. C. A. 3rd, 1944), Goodrich, C. J.

In the present proceeding the District Court quite properly applied the general limitation law of Pennsylvania (the forum). District Judge Bard said in his opinion:

> "Since the cause of action has been fully barred by the limitation laws of Kentucky, the state in which it arose, the Pennsylvania 'borrowing' statute makes the Kentucky statute of limitations operative as the applicable limitation law of the forum.

"The Pennsylvania Act of June 26, 1895, borrows the Kentucky limitation statute which becomes the limitation law of the forum for the purposes of this case, and requires that plaintiff's remedial rights against defendants be controlled by the five year limitation period of Kentucky." *Anderson v. Andrews*, 62 F. Supp. 705 at 708-9, (D. C. Pa., 1945).

**B. The Kentucky Statute of Limitations Borrowed by the Pennsylvania Act of June 26, 1895.**

The applicable statute of limitations of the State of Kentucky provides:

> "An action upon a contract not in writing, signed by the party, expressed or implied; an action upon a liability created by statute, when no other time is fixed by the statute creating the liability . . . shall be commenced within five years next after the cause of action accrued." (General Statutes, Chap. 71, Art. III, Sec. 2; Kentucky Revised Statutes, Baldwin's 1930 Revision, Chap. 80, Sec. 2515.)

The Kentucky statute of limitations applies to all actions at law and in equity. Suit against the shareholders of Banco had to be commenced within five years. The last day was March 31, 1936. The Receiver exercised care in this regard with respect to shareholders of Banco living in Kentucky and instituted suit against those shareholders on February 19, 1936.

In the action against Banco shareholders living in Kentucky [*A. M. Anderson, Receiver of National Bank of Kentucky v. Davis J. Abbott, et al.*, United States District Court, Western District of Kentucky, Louisville, No. 1046] the case came before District Judge Swinford on motions presenting the sufficiency of the complaint and the legality of the defense of the statute of limitations [*Anderson v. Abbott et al.*, 23 F. Supp. 265 (D. C. Ky., 1938)]. With respect to the statute of limitations counsel for the Receiver

took the position that the action was commenced within the five year period and that it made no difference whether the cause of action accrued on the date the assessment was levied (February 20, 1931) or the date it was payable (April 1, 1931) because the action was instituted within five years of each of these dates. In his opinion dated May 13, 1938, Judge Swinford sustained the position of the Receiver, saying:

> "The Statute of Limitations is not a defense. The Kentucky Statute, Section 2515, provides certain character of actions that must be brought within five years. . . .
>
> "An action against the shareholders for an assessment does not accrue until the assessment is due and payable. The assessment was levied on February 20, 1931, and payable on April 1, 1931. This proceeding was instituted on February 19, 1936. It was April 1, 1931, that the right of action accrued" (p. 268).

In the case of *The Auditor v. Halbert*, 78 Ky. 577 (1880) the court held that the statute of limitations (quoted above) applied to cases in equity (p. 578):

> "The word 'action' as used in the statute of limitations is not restricted in its signification to that which is technically an action, but includes all civil proceedings in courts of justice for the enforcement of legal or equitable rights, whether by action, suit, or special proceedings."

Again, in the case of *Hargis v. Sewell's Administrator*, 87 Ky. 63 (1888), the court said (p. 67):

> ". . . The statute of limitations applies to all actions, whether at law or in equity, and the chancellor can exercise no discretion on the subject, but must apply the statute when properly pleaded, although the jurisdiction over the subject matter belongs exclusively to a court of equity."

It is clear that under the law of the State of Kentucky any action against the shareholders of Banco to recover the statutory double liability had to be instituted before April 1, 1936. It is equally clear that the present action against the shareholders of Banco to recover the statutory double liability was commenced on February 18, 1937 (over ten months after April 1, 1936) and would have been barred by the law of Kentucky where it arose. By virtue of the Pennsylvania Act of June 26, 1895 which applies the Kentucky five year statute in the instant situation, the present action is barred by the law of Pennsylvania.

The Kentucky cases cited above set forth the rule that the Kentucky statute of limitations bars all actions—whether they be equitable or legal. The Pennsylvania Act of June 26, 1895 applies to all causes of action which have been fully barred by the laws of the state in which they arose. Therefore, the present action would be barred by the law of Pennsylvania even if equity were the exclusive remedy.

### C. The "Cause of Action"—When It Arose.

*The possibility of statutory double liability* as a holder of stock of a national bank first comes into existence upon the acquisition of the national bank stock. *Liability* arises when the bank is found to be insolvent and the Comptroller makes an assessment which must be paid to the Receiver on or before a date fixed by the Comptroller. The *cause of action* arises when the shareholder fails to pay the assessment to the Receiver at the time and place fixed for payment.

The statutory provision does not in and of itself create a cause of action. A cause of action does not arise until a prohibited act is committed or until there is a failure to perform a required act. The failure of duty which gives rise to a cause of action against a shareholder of a national bank is the failure to pay the assessment to the Receiver on the date and at the placed fixed for payment.

The "order" of the Comptroller does not in and of itself create a cause of action: *Rawlings v. Ray, supra; Pufahl v. Parks, supra.* The Receiver cannot sue until the shareholder fails to pay the assessment at the time and place designated. The decisions of this Court have established beyond question that the statute of limitations does not begin to run until the liability ripens into a cause of action upon failure to make payment to the Receiver as directed by him.

If the contention of the Receiver—that the "order" of the Comptroller creates a cause of action—were correct, then the statute of limitations would begin to run *when* the Comptroller issued his "order". Such is not the case:

> "In *Rawlings v. Ray*, 312 U. S. 96, we decided that state statutes of limitations govern the time within which to enforce the liability imposed upon stockholders of insolvent national banks by assessments levied by the Comptroller of the Currency • • • and, that suit cannot be instituted prior to the date fixed for payment and a state statute of limitations does not begin to run until that date." *Fisher v. Whiton*, 317 U. S. 217, at 218 (1942).

The order of the Comptroller applies with equal force to all shareholders, but the Receiver does not have a cause of action against all shareholders. The Receiver only has a cause of action against shareholders who do not pay the assessment to him on or before the date fixed by the Comptroller in his order.

The alleged cause of action here arose *when* the defendants failed to pay the assessment to the Receiver at his office on or before April 1, 1931:

> "An action against the shareholders for an assessment does not accrue until the assessment is due and payable. The assessment was levied on February 20, 1931, and payable on April 1, 1931. This proceeding was instituted on February 19, 1936. It *was April 1, 1931,*

*that the right of action accrued.'' Anderson v. Abbott et al.*, 23 F. Supp. 265, 268 (D. C. Ky., 1938) (Italics added).

### D. The "Cause of Action"—Where It Arose.

Recent decisions of this Court are all to the effect that a cause of action does not arise until a shareholder fails to pay the assessment to the Receiver by the date fixed by the Comptroller. It is submitted that this failure to pay the Receiver also determines where the cause of action arose. This thought is well expressed in the following language taken from the opinion of Cleasby, one of the Judges of the Court of Eschequer in *Durham v. Spence*, the Law Reports Exchequer Cases, Vol. 6, 1870-71, p. 52:

> "Now the cause of action must have reference to some time as well as to some place; does then the consideration of the time when the cause of action arises, give us any assistance in determining the place where it arises? I think it does. The cause of action arises when that is not done which ought to have been done, or that is done which ought not to have been done. But the time when the cause of action arises, determines also the place where it arises; for when that occurs which is the cause of action, the place where it occurs is the place where the cause of action arises. I cannot avoid the conclusion that a cause of action arises where that takes place which first makes a cause of action; . . ."

#### 1. The Statutory Liability Arose in Kentucky.

In the instant case the National Bank of Kentucky was physically located in Louisville, Kentucky; its principal place of business was Louisville, Kentucky; and, it provided banking facilities for the State of Kentucky. The business of The Bank was at all times carried on and transacted in Kentucky and the insolvency of The Bank

occurred in Kentucky: "Said Bank was closed by resolution of its Board of Directors on the 16th day of November, 1930." (Bill of Complaint, R-4a.) A national bank's corporate capacity survives the appointment of a Receiver and ends only when its affairs are settled and assets distributed: *Chemical National Bank v. Hartford Deposit Co.*, 161 U. S. 1 (1895).

National banks are localized in the state in which they are situated by the provisions of the National Bank Act (13 Stat. 99, 12 U. S. C. § 21, et seq.). As set forth in the Bill of Complaint The Bank was a resident of and ". . . *domiciled* at Louisville, Jefferson County, in the Western District of Kentucky" (R-4a). While The Bank was a Federal corporation it was a citizen of Kentucky for the purpose of diversity of citizenship: *Pufahl v. Parks, supra;* 36 Stat. 1092, 28 U. S. C. § 41 (16). The Bank was subject to suit only in the Western District of Kentucky: *Leonardi v. Chase National Bank*, 81 F. (2d) 19 (C. C. A. 2nd, 1936), *cert. den.* 298 U. S. 677; 13 Stat. 108 and 18 Stat. 320, 12 U. S. C. § 94. Many other important requirements and privileges of national banks are determined by the city and state of domicile, viz.: place of business (24 Stat. 18, 12 U. S. C. § 30); residence of directors (33 Stat. 818, 12 U. S. C. § 72); consolidation and merger (49 Stat. 718, 12 U. S. C. §§ 33, 34a); branch offices (44 Stat. 1228, 12 U. S. C. § 36); capital and surplus requirements (31 Stat. 48, 12 U. S. C. § 51); and, shareholder records (13 Stat. 111, 12 U. S. C. § 62).

The office of A. M. Anderson, Receiver of The Bank, is located at 420 West Jefferson Street, Louisville, Kentucky. The Comptroller of Currency, Treasury Department, Washington, D. C., authorized and directed the Receiver to collect the 100% assessment levied by him. Pursuant to the authorization the Receiver notified Banco shareholders that he planned to collect the assessment from them. He also sent letters to all shareholders of Banco directing said shareholders to make payment at his office.

The shareholders' statutory obligation was to pay the 100% assessment to the Receiver at his office—420 Jefferson Street, Louisville, Kentucky. The Receiver recognized this fact and "acting pursuant to the authority and direction of the Comptroller of the Currency . . . sent and served upon each of the defendants and all other shareholders of the Banco Kentucky Company" an assessment notice "payable at the Office of the Receiver on or before April 1, 1931." (Bill of Complaint, R-17a.) Under the pleading in this case the allegation of the Receiver must be taken as true. Apart from that, it is in fact true. It is the same obligation imposed by the law. There was no place other than Louisville, Kentucky, at which tender or payment could have been made. The Receiver did not, and could not be expected to maintain offices or agents in each of the forty-eight states. Tender by the defendant at his home—Dimock, Susquehanna County, Pennsylvania—certainly would not have satisfied his statutory obligation.

The contention of the Receiver that the cause of action arose in the United States of America and not in any state presupposes that the whole does not include its parts.

The opinion of the Circuit Court states:

> "We think, therefore, that this is not the kind of cause of action which is properly described as arising within the State of Kentucky. It did not arise there any more than it did in any other one of the states of the United States." *Anderson v. Andrews*, 156 F. (2d) 972 at 975 (C. C. A. 3rd, 1946).

This opinion ignores the fact that legally and geographically the United States is a federal union of the states and not a separate geographical entity where a cause of action can arise: see *Texas v. White*, 74 U. S. (7 Wall) 700 (1868). Under the theory of the Circuit Court a cause of action based upon a single statutory liability and a single factual situation either (1) must arise in each of the forty-eight states in which a shareholder who did not pay the assessment resides, or (2) it does not arise in any state

of the United States. We believe this theory is erroneous. Geographically such a cause of action, if it arises in the continental United States, must of necessity arise in one of the states of the United States or the District of Columbia. Any contention that the cause of action arises in more than one state must be based on the theory that it arises at the residence of the defendant. But the basis of jurisdiction over the defendant does not fix the location of the cause of action:

> "The parties were at all times nonresidents of Kansas. Did the causes of action arise in that state or elsewhere? The claim is that, being transitory, they arose wherever the defendants could have been sued, and that they did not arise in Kansas because the defendants were nonresidents and out of the state. . . .
> "The place where a cause of action arises is not determined by inquiring where it may be enforced. *The two things are not the same.* The right of action must arise, come into being, before it can be enforced anywhere, and when it has arisen the action for its enforcement, unless purely local, may be maintained in any state." [Judge (later Justice) Van Devanter in *Anglo-American Land, M. & A. Co., v. Lombard,* 132 Fed. 721 at pp. 749, 750 (C. C. A. 8th, 1904); Italics added.]

A cause of action arises *when* a prohibited act is committed or a required act is omitted and it arises *at the place* where the prohibited act is performed or the required act should have been performed: *Baltimore & O. R. Co. v. Reed,* 223 Fed. 689 (C. C. A. 6th, 1915) (an action for personal injuries); *Pond Creek Mill & Elevator Co. v. Clark,* 270 Fed. 482 (C. C. A. 7th, 1920) (an action for breach of contract); *Augláize Box Board Co. v. Kansas City Fiber Box Co.,* 35 F. (2d) 822 (C. C. A. 6th, 1929), *cert. den.* 281 U. S. 730 (an action on a contract).

The place where a cause of action upon a liability created by a federal statute arises is the state where the

operative facts occurred which converted the statutory liability into an enforceable obligation: *Bluefields S. S. Co. v. United Fruit Co.*, 243 Fed. 1 (C. C. A. 3rd, 1917) (action under the Sherman Act); *Hansen Packing Co. v. Swift & Co.*, 27 F. Supp. 364 (D. C. N. Y., 1939) (action under Federal Anti-Trust Laws); *Smith v. Continental Oil Co.*, 59 F. Supp. 91 (D. C. N. Y., 1945) (action under Fair Labor Standards Act of 1938).

The present cause of action arose in Kentucky *where* (1) the entire business of the bank was conducted, (2) the insolvency of the bank occurred, (3) the shareholders were obligated to pay the statutory assessment and (4) the breach of the statutory duty occurred.

**2. Kentucky Was the Place of Performance.**

For the purposes of this case it is immaterial whether the liability is considered purely statutory or contractual in nature. Under either theory the place of performance was Louisville, Kentucky, and the cause of action arose there.

The District Court held that the liability, while statutory in origin, is contractual in nature. This accords with the following decisions of this Court:

*Brown v. O'Keefe*, 300 U. S. 598 (1937).

"Even so, the liability created though it is by statute, is quasi-contractual in its origin and basis. . . . It is an incident affixed by law to the contract of membership between shareholder and bank. . . . A liability upon quasi-contract is one upon an 'implied contract', and so provable in bankruptcy . . . if the other conditions of allowance are found to be fulfilled" (pp. 606-607).

*Chisholm v. Gilmer*, 299 U. S. 99 (1936).

"It (remedy by notice of motion) is here sought to be applied, not in equity or admiralty . . . but in a common law cause, a quasi-contractual obligation being the source of liability" (p. 102, parenthesis added).

*Bernheimer v. Converse*, 206 U. S. 516 (1907).

"It may be regarded as settled that upon acquiring stock the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature and, as such, capable of being enforced in the courts not only of that State, but of another State and of the United States . . . although the obligation is not entirely contractual and springs primarily from the law creating the obligation" (p. 529).

*Platt v. Wilmot*, 193 U. S. 602 (1904).

"In the *Whitman* case it was held that this liability, though statutory in origin, was contractual in its nature; or, in other words, the stockholder when he subscribed for or purchased his stock entered into a contract authorized by statute. . . .

". . . the contract being that the holder of the stock shall be liable in accordance with the terms of the statute.

"Also, while the liability is contractual in its nature, it arises out of the Constitution or the statute, or from a combination of both, by virtue of the application of general principles of law to the facts in the case. Neither the Constitution nor the statute says that the liability is contractual, but, as the Constitution and statute existed, the liability arising therefrom, as against the stockholder, is because of the principle of law which works out a contractual liability upon these facts and it may be fitly described as the common law" (pp. 612-613).

The Circuit Court of Appeals rejected this view of the nature of the liability. In the case of *Anderson v. Helmers, et al.*, No. 656, October Term, 1946, to be argued with this case, the Circuit Court of Appeals for the Sixth Circuit adopted the theory that the liability was statutory. Under either theory (1) the place of performance of the share-

holders' obligation was Louisville, Kentucky, (2) the breach of duty (failure to pay the assessment) which created the cause of action occurred in the State of Kentucky, and (3) the cause of action is barred by the statute of limitations of Kentucky where it arose, and therefore (4) under the Act of June 26, 1895, it is barred in Pennsylvania, the forum in the instant case.

### 3. The District of Columbia.

In the instant proceeding the opinion of the Circuit Court of Appeals seems to suggest that the cause of action arose in the District of Columbia:

> "Nor are we satisfied that when the Receiver named his office as the place where checks could be sent to pay the assessment that made the office the 'place of performance.' The recipient of the payment was really not the Receiver but the Comptroller General of the United States who, obviously, is not located in Kentucky." *Anderson v. Andrews*, 156 F. (2d) 972 at 974 (C. C. A. 3rd, 1946).

It is submitted that the location of the offices of the Comptroller General and of the United States Treasury in the District of Columbia is not sufficient basis for holding that the present cause of action arose in the District of Columbia. However, even if the suggestion of the Circuit Court is correct the present proceeding would nonetheless be barred by the law of Pennsylvania.

The Acts of Congress (Act of March 3, 1901, 31 Stat. 1389, Chap. 854, § 1265; Act of June 30, 1902, 32 Stat. 542, Chap. 1329) embodied in the District of Columbia Code (1940 ed., Section 12-201) provide for limitation of actions in the District of Columbia as follows:

> "No action shall be brought . . . upon any simple contract, express or implied . . . after three years from the time when the right to maintain any such

action shall have accrued; nor for any statutory penalty or forfeiture . . . after one year from the time when the right to maintain any such action shall have accrued; and no action the limitation of which is not otherwise specially prescribed in this section shall be brought after three years from the time when the right to maintain such action shall have accrued. . . ."

If the present cause of action arose in the District of Columbia and is statutory in nature the time within which the Receiver was required to bring this action under the law of Pennsylvania was within one year after April 1, 1931 by virtue of the Pennsylvania Act of June 26, 1895, or, if the cause of action is on an implied contract, then within three years after April 1, 1931.

If it should be contended that the District of Columbia is not a "state" within the meaning of the Pennsylvania Act of June 26, 1895, we submit that the word "state" is used in that Act in its broadest significance as meaning a political subdivision of a federal government. It includes not only the states of the United States which were in existence at the time of the passage of the Act, but territories which have since become states such as Arizona, Oklahoma, New Mexico and Utah. It also includes the District of Columbia. The obvious intent of the "borrowing act" is that if the action would be barred at the place where it arose it is also barred in Pennsylvania.

Congress in adopting national legislation treats the District of Columbia as if it were a state, e. g., the Federal Communications Act of 1934 [48 Stat. 1064 et seq., 47 U. S. C. § 153 (e)]; see *Sablowsky v. United States*, 101 F. (2d) 183 (C. C. A. 3rd, 1938).

In the case of *Talbott v. Silver Bow County*, 139 U. S. 438 (1891), Mr. Justice Brewer, speaking for this Court, said:

"Still further, while the word State is often used in contra-distinction to Territory, yet in its general pub-

lic sense, and as sometimes used in the statutes and the proceedings of the government, it has the larger meaning of any separate political community, including therein the District of Columbia and the Territories, as well as those political communities known as States of the Union. Such a use of the word 'State' has been recognized in the decisions of this court. • • •

"On the face of the language, *the word* 'state' would seem to refer, not to political communities in general, but to those particular communities which form the States of the Union; yet it was held to include the District of Columbia, this court, by Mr. Justice Field, observing: 'This article is not happily drawn. It leaves in doubt what is meant by "States of the Union." Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as States though the extent of their political sovereignty be limited by relations to a more general government or to other countries. Halleck on Int. Law., c. 3, §§ 5, 6, 7. The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government. Within this definition the District of Columbia, under the government of the United States, is as much a State as any of those political communities which compose the United States'" (pp. 444-5).

The District of Columbia law provides for a one year limitation for a statutory penalty or forfeiture and for a three year limitation (a) upon an action upon any simple contract, express or implied, and (b) upon all other actions when the limitation is not otherwise especially prescribed.

The shareholders' liability, whether statutory or contractual, would therefore be barred if the cause of action arose in the District of Columbia.

**E. The Circuit Court of Appeals Did Not Apply the Law of the Forum.**

The opinion of the Circuit Court of Appeals in the instant case did not apply the Pennsylvania Act of June 26, 1895, the applicable limitation law of the forum, and gave the following as a reason for not doing so:

> "There is a wider ground, however, on which we think the defendants are wrong and which compels a reversal of the judgment of the District Court. The approach, we think, is found in the language of Mr. Justice Frankfurther speaking for the Court in Holmberg, et al. v. Armbrecht, et al., U. S. , decided February 25, 1946. In the case which involved liability of shareholders in the Southern Minnesota Joint Stock Land Bank he said: '*We do not have the duty of a federal court, sitting as it were as a court of State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress.*' In our case the liability imposed upon the shareholders of national banks for the benefits of their creditors is not a state created right, but one created by United States statute. The liability extends to all shareholders regardless of the state where the bank has its principal place of business and regardless of where shareholders live. In dealing with it the rules applicable are not those in which a federal court, sitting in a diversity case, applies state law as accurately as it can. It is, rather, one of those instances where federal courts are enforc-

ing rights arising out of transactions governed by the federal government acting within its constitutional field." *Anderson v. Andrews, supra*, at page 975 (Italics added).

It is submitted that the statements of the court quoted above would mean that no state statute of limitations is applicable. However, the rule in such cases is firmly established that the law of the forum governs so far as the limitation of actions is concerned: *Fisher v. Whiton, supra; Rawlings v. Ray, supra; Pufahl v. Parks, supra.*

The Circuit Court of Appeals based this new approach to the instant case primarily on two sentences, which are italicized in the above quotation, from the decision of this Court in the case of *Holmberg, et al. v. Armbrecht, et al.*, 327 U. S. 392 (1946). It is submitted that the Circuit Court erred in applying the rule of that case because it falls in an entirely different category from the case at bar. We have no criticism of that decision or of the quoted language of Mr. Justice Frankfurther in its setting, but when the two cases are analyzed it is clear that this language is not applicable to the present case. The *Holmberg* case was a *suit in equity by creditors* of a joint stock land bank against its stockholders to enforce their liability. A New York stockholder had fraudulently concealed his ownership under the name of Armbrecht. This was not discovered till 1942. Suit was brought in 1943. The defenses were (1) the New York statute of limitations of ten years and (2) laches. This Court had previously held in *Russell v. Todd*, 309 U. S. 280 (1940), that the New York three year statute of limitation did not bar such a suit because, unlike a receiver's suit, the *sole* remedy in a creditor's suit is in equity and the state statute would not bar it if brought in a state court. The *Holmberg* decision therefore fell within the rule that where the sole remedy is in equity Federal Courts are not bound to adopt state statutes of limitation applicable only to actions at law.

Mr. Justice Frankfurter was at pains to point out that the *Holmberg* case was one where the sole remedy is in equity. In the sentence immediately preceding that quoted by the Circuit Court, he states:

> "The present case concerns not only a federally-created right but *a federal right for which the sole remedy is in equity*" (p. 395, italics added).

The entire opinion of Mr. Justice Frankfurther is bottomed on this fact. In contrast, the present case is one in which there is concurrent jurisdiction in both law and equity and which falls within the rule that the statute of limitations that bars the legal right also bars recovery in a suit in equity.

The distinction between a creditor's suit in equity against stockholders of a joint stock land bank and a receiver's suit against stockholders of a national bank is clearly set forth by former Chief Justice Stone in *Russell v. Todd, supra.* The limitation rules applicable to these two classes of suit are entirely different: see *Russell v. Todd, supra; Rawlings v. Ray, supra.* We respectfully submit, therefore, that the *Holmberg opinion,* when read in its entirety, affords no support for the decision of the Circuit Court.

## CONCLUSION.

It was the statutory obligation of the shareholders to pay the assessment to the Receiver at his office in Kentucky. The failure to make this payment to the Receiver in Kentucky gave rise to the present cause of action. The cause of action arose in Kentucky on April 1, 1931. It was barred by the Kentucky five year statute of limitations on April 1, 1936. The present action was started more than ten months thereafter and is barred by the Pennsylvania Act of June 26, 1895.

The present action is an attempt by the Receiver to enforce a stale claim on what has been admitted to be a "harsh" liability. In addition, the double liability of shareholders of national banks has since been removed

(Acts of June 16, 1933, c. 89, § 22, 48 Stat. 189 and Aug. 23, 1935, c. 614, § 304, 49 Stat. 708; 12 U. S. C. § 64a).

The present action has long delayed the settlement of many estates. As stated recently by this Court in other litigation brought by this Receiver, involving his attempt to substitute parties after the two year limitation imposed by Rule 25 (a) of the Rules of Civil Procedure:

> "The normal policy of a statute of limitations is to close the door—finally, not qualifiedly or conditionally. The federal law embodied in Rule 25 (a) has a direct impact on the probate of estates in the state courts. It should not be construed to be more disruptive of prompt and orderly probate administration in those courts than its language makes necessary." *Anderson v. Yungkau,* U. S. , 15 U. S. Law Week 4150 (1947).

In such a situation the statute of limitations should be strictly enforced:

> "The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation, after the lapse of a reasonable time. It has been regarded by this Court and by the courts of New York as a meritorious defense, in itself serving a public interest." *Guaranty Trust Co. of New York v. United States,* 304 U. S. 126 (1938).

The judgment of the Circuit Courts of Appeals should therefore be reversed.

Respectfully submitted,

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No. 593

IN THE

# Supreme Court of the United States

October Term 1946

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FRANCIS R. COPE, JR.,

*Petitioner,*

v.

A. M. ANDERSON, Receiver of the National Bank of Kentucky,

*Respondent.*

---

## BRIEF OF RESPONDENT IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

---

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CINCINNATI, OHIO

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---

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent, A. M. Anderson, Receiver of the National Bank of Kentucky, respectfully submits that this petition for writ of certiorari should be granted in order to resolve the conflict of the decision in this case with the decision of the Sixth Circuit Court of Appeals on the same matter. The Respondent herein has addressed to this honorable court his petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit in the case of *Lawrence S. Helmers, et al.* v. *Respondent*, decided June 24, 1946, which petition is No. , October Term 1946. In said petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit the Respondent respectfully submits that the Sixth

Circuit Court of Appeals erroneously determined the question involved in that case and that the United States Circuit Court of Appeals for the Third Circuit correctly decided the same question in the present case.

The Respondent having set forth in the petition for certiorari to the Sixth Circuit Court of Appeals his contention as to the correct rule of federal law to be applied herein, respectfully refers to said petition for certiorari and the brief in support thereof to avoid unnecessary repetition herein.

Although Respondent believes that the question involved was correctly determined by the Circuit Court of Appeals for the Third Circuit, a review of which is sought herein, and that said decision is in conformity with the applicable decisions of this court, Respondent recognizes that it would be obviously unjust to impose liability upon the shareholders who are defendants in the present case and to relieve the shareholders residing in Ohio from liability in the case decided by the United States Circuit Court of Appeals for the Sixth Circuit.

Wherefore, Respondent believes that it would be in the interest of justice to grant the prayers of the petitions for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit, entered August 13, 1946, and the judgment of the Circuit Court of Appeals for the Sixth Circuit, entered June 24, 1946, in the case of *A. M. Anderson, Petitioner* v. *Lawrence S. Helmers,* No. , October Term 1946.

ROBERT S. MARX,
FRANK E. WOOD,
WM. C. KELLY,
HARRY KASFIR,
VINCENT C. VELDORALE,
*Counsel for Respondent.*

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## BRIEF FOR RESPONDENT

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IN THE

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v.

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*Respondent.*

---

## BRIEF FOR RESPONDENT

---

### INTRODUCTION

The question for decision is one of substantive federal law—In what jurisdiction did Respondent's cause of action arise, within the meaning of the Pennsylvania borrowing statute?

Petitioner's theory proceeds on the assumption (1) that a material "operative fact" was the failure of the holding company's shareholders to pay and (2) that "operative fact" occurred within the territorial limits of the State of Kentucky. Having no defense on the merits and amen-

distinct and to which Petitioner was not a party. *McClaine* v. *Rankin*, 197 U. S. 154, 161.

The liability arose out of the ownership of intangible personal property—BancoKentucky Company stock. Under the terms of membership in the Delaware corporation, the situs of its stock, "for all purposes of title" except taxation, was Delaware. Section 73, Del. Corp. Law. For purposes of taxation, the situs of that stock was Pennsylvania. 51 Amer. Jur. Taxation, pp. 496, 497. Petitioner "contracted" his liability at the situs of his ownership. The place where the bank failed is of no more significance in this case than the place where a maker of a promissory note defaults, in connection with the liability of an endorser who executed *his contract* in some other jurisdiction. 11 Amer. Jur. Conflict of Laws, p. 447; *Musson* v. *Lake*, 45 U. S. 262.

Petitioner correctly represents (B. p. 14) that Respondent notified Banco shareholders that he planned to collect the assessment from them, if unsuccessful in the action against Banco. But the statement "He also sent letters to all shareholders of Banco directing *said shareholders* to make payment at his office," is not supported by the record. All the Respondent did was to warn Banco shareholders he would look to them if he could not recover from Banco. That was done solely to reserve Respondent's rights and in anticipation of the defense, later asserted and overruled, that Banco shareholders were excused from liability by an election to look to the holding company. If that notice could possibly be interpreted as an attempt by the Receiver to require Respondent to pay in Kentucky, it could have no more effect on this claim than the conduct of the receiver in *LaParr* v. *City of Rockford*, 100 Fed. (2d) 564 (C. C. A. 7, cert. den., 307 U. S. 624). There a receiver, without lawful authorization, paid the city's deposit in full. Rescission was ordered because the payment was in excess of the legal powers of both the Comptroller

and the receiver. Respondent's predecessor was equally powerless to fix a place for the payment of Petitioner's debt.

Petitioner argues that he would have had to have paid in Louisville in any event, that being the law. Neither federal statute, nor decisions construing them, disclose any such duty. But it is said that there was no place other than Louisville, Kentucky, "at which tender or payment could have been made," and that "tender by defendant at his home, Dimock, Susquehanna County, Pennsylvania—certainly would not have satisfied his statutory obligation." This case presents no issue of tender, such as might avoid a forfeiture or the payment of interest. Tender, like failure of payment, gets into this case by way of argument in support of a motion to dismiss.

Respondent's contention that the cause of action arose in the country, is said to presuppose that the whole does not include its parts. Of course, the whole does include its parts, but if the parts have no significance in the deciding problem at hand, there is only the whole to consider.

The court below correctly concluded that Respondent's cause of action did not arise in Kentucky any more than it did in any other state. This is said to ignore the fact that, geographically, the United States is a Federal Union of states "and not a separate geographical entity where a cause of action can arise." Citing *Texas* v. *White*, 74 U. S. 700. The argument is that, "geographically such a cause of action, if it arises in the continental United States, must of necessity arise in one of the states of the United States or the District of Columbia."

In *Texas* v. *White*, the court discussed the several connotations attributed to the word "state," concluding that the primary conception is that of a people, or community. Regarding the Union, it was said (p. 721):

> "It is the union of such states, under a common constitution, which forms the distinct and *greater political unit*, which that Constitution designates as the United States, and makes of the people and states which compose it *one people and one country.*"

Petitioner is a citizen of this country, and with respect to the privileges, rights and duties which such citizenship surrounds him, it is of no importance that, geographically, he exercise such rights, or is compelled to recognize such obligations, in Dimock, Susquehanna County, Pennsylvania, or in any other place located in a county and state.

With Petitioner's approach, we could as well say that a tort giving rise to a cause of action must arise within the country, within some state, within some municipal corporation and within the boundaries of someone's property. But we are concerned here with systems of laws which shape the legal consequences of man's conduct. The boundaries of municipal corporations within which something takes place, giving rise to a legally enforcible right, are only of importance when the *laws* of these communities may govern such right.

The legal consequences of conduct within the boundaries of a state may or may not be of permissible concern to the state. The laws of the State of Washington create a cause of action against an employer for the wrongful death of an employee. Such a death, within the boundaries of that state, but also in the Puget Sound Navy Yard, had no such consequence because the place where the death occurred was within the exclusive jurisdiction of the laws of the United States. *Murray* v. *Gerrich*, 291 U. S. 315. California may not regulate the sale or use of alcoholic beverages in a national park within its boundaries. *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 530. Under state law, innkeepers are liable for the loss of a guest's belongings, but that law may not be the measure of an innkeeper's liability

when the hotel is in a national park, though the park is within the state. *Arlington Hotel* v. *Fant*, 278 U. S. 439. And a state is powerless to punish for crimes committed on federal property which is within the exclusive jurisdiction of federal laws. *Stewart* v. *Sadrakula*, 309 U. S. 94, 101. This country's gold at Fort Knox is not in Kentucky so far as that state is concerned.

The Pennsylvania borrowing statute is perfectly clear in its reference to "the state or country *in which* it arose." It has reference to some system of jurisprudence other than Pennsylvania's. It refers to some other sovereign power.

Something of the same geographical argument as Petitioner's was advanced by the state officials in *McCulloch* v. *Maryland*, 17 Wheat. 315. Chief Justice Marshall there discussed our system of federal and state governments, which, though existing within the same territorial limits, have separate spheres within which each is supreme. The State of Maryland argued that the Constitution of our country was a creation of independent and sovereign states which delegated powers to it and that the states alone were truly sovereign. The Court held that the Constitution emanated from all the people (p. 402). The fact that the people, citizens of sovereign states, acted within the territorial limits of their states was only of geographical importance.

> "No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments. . . .
>
> "If any one proposition could command the universal assent of mankind, we might expect it would be this—

able to suit only in Pennsylvania, Petitioner is compelled to argue that Kentucky is the state within which the cause of action arose. This contention is based upon a misconception of the nature of the statutory liability and a misinterpretation of the language, purpose and effect of the notice sent to all Banco shareholders throughout the country, that the Receiver intended to look to them for payment of the holding company's liability on the trustees' participation shares to the extent that company was unable to respond.

Though the liability sought to be enforced contains no element of contract, is not based on any wrong or default, and the cause averred presents not even an inference on the subject of payment, Petitioner proceeds to answer the question for decision first by assuming a different cause of action and then answering the question by resort to principles of contract law and tort law applicable to state created rights.

## QUESTIONS PRESENTED*

Petitioner's brief poses three questions:

> "1. Is the suit barred by the Pennsylvania Act of June 26, 1895, a part of the general limitation law of the forum, which 'borrows' the limitation period of the State where the cause of action arose?"

The Act of 1895 borrows the period of the "state *or country* in which it arose."**

> "2. Does the limitation law of the forum apply in an action by a receiver of a national bank to enforce the double liability of its shareholders, which liability has its origin in a federal statute?"

---

* Throughout this brief Respondent follows the order of arrangement in Petitioner's brief.

** Emphasis is Respondents, unless otherwise noted.

Respondent has always conceded that the limitation law of the forum does apply and the court below so found.

> "3. When the receiver of a national bank in accordance with an assessment made by the Comptroller of the Currency, directs the shareholders of that bank to pay the assessment to him at his office on or before a specified date, does the cause of action arise and accrue *when* payment is not so made and *where* the shareholder was directed, and had the duty, to make the payment?" (Petitioner's emphasis.)

The order of assessment fixed no place for payment. No one was "directed" to pay any place. The Receiver's notice to Banco shareholders did not even request, much less direct them to pay.

The cause of action *accrued* April 1, 1931, not because of any failure on the part of Banco shareholders to pay, but solely because the Comptroller's instructions to the Receiver did not permit suit until that date.

## STATUTES INVOLVED

In addition to the statutes quoted in Petitioner's brief, reference is made to the one held controlling by the court below, the Act of March 27, 1713, providing a six-year period (R. 60). This cause was filed well within that period.

## STATEMENT OF FACTS

The gist of Petitioner's statement of facts shows that, as a shareholder in a Delaware holding corporation, Banco, he became liable for a proportionate part of the assessment levied upon shareholders of the National Bank of Kentucky. The holding company's shares represented a proportionate ownership in the trustees' participation certificates held by Banco. Those certificates in turn represented ownership of the bank's shares.

Considerable emphasis is placed by Petitioner upon part of the notice the Receiver sent all of the holding company's shareholders sometime before the assessment was payable. The part stressed is only the introduction to the notice. In that sentence appear the words "payable at the Office of the Receiver." The notice, in its entirety, recites the assessment on shareholders of the bank, a demand for payment upon the Receiver of Banco "as the holder of 540,484 trustees' participation certificates . . . which . . . represent the ownership of 37,721.624 shares of stock in the National Bank of Kentucky" and concludes with the warning that the Receiver would "proceed" against Banco shareholders to collect the assessment liability represented by the participation certificates held by Banco, to the extent the Receiver was unable to collect from Banco. Enclosed with that notice was the Comptroller's order of assessment. The order itself fixed no place for payment (R. 7a). That was conceded by the court in the *Hellmers* case (Hellmers R. 9).

Ownership of three different kinds of certificates imposed liability to assessment. They were (1) the certificates issued by the bank, holders of which were "shareholders" of the bank for all purposes; (2) trustees' participation certificates held by Banco, and (3) Banco's shares. There was more than the mere difference in terminology in these three kinds of papers, though ownership of each imposed assessment liability. The Receiver's warning notice was directed to Petitioner "as a stockholder of the Banco-Kentucky Company," not as a shareholder of the bank or as the holder of trustees' participation certificates.

## ARGUMENT

### (A) The Pennsylvania Borrowing Statute Is Not the Applicable Statute of Limitations.

Little is presented in this section of Petitioner's Brief which throws light on the question, or which is in controversy. The borrowing statute is, of course, part of the procedural law of the forum but it is not the "general" period of the forum. It is an exception, shortening the general statutory period and should be strictly construed as such. The District Court held that this exception to the general law controlled. The court below held only the general period applied.

Respondent agrees that statutes of limitation are procedural; that the law of the forum governs; and that the courts of Pennsylvania hold its borrowing act applicable to causes of action arising under the substantive law of other jurisdictions. The issue in *Mister* v. *Burkholder*, 56 Pa. Super. 517 (1914), was *when* the statute began to run, not *where* the cause of action arose. There the receiver of a Maryland corporation brought suit in Pennsylvania, against residents of that state, for an assessment ordered by the Maryland court. Under Maryland law, defendant's liability was an asset of the corporation. Under the National Bank Act assessments are not assets of the bank at all. 12 U. S. C. A. § 64, Note 185. The cause of action against shareholders of the Maryland corporation was a creature of Maryland law. There is no state substantive law regarding the assessment liability of national bank shareholders. In *Fletcher's Estate*, 45 D. & C. 673 (1942), the cause of action was based upon a promissory note, made and payable in Maryland. In the eyes of the law, the plaintiff there expressly agreed that his cause of action arose in Maryland. It was a state created right.

While Respondent has not challenged the constitutionality of the borrowing statute, Petitioner cites *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553, on that point. The case does present an interesting situation, in that there the period of limitations of the "country" where the cause of action arose was borrowed. In that case, the negligence of the Canadian corporation resulted in injuries to the plaintiff while he was in its employ, in the Province of Saskatchewan. Plaintiff brought suit in Minnesota. Of course he could have brought action where the tort occurred, in Saskatchewan. The Minnesota period of limitations for such torts was six y ars. The cause of action, however, arose under the Railw y Act of Canada (255 Fed. 937). Canada had a one-year general statute of limitations. The Minnesota borrowing statute adopted the Canadian one-year period. The tort occurred in Saskatchewan but the laws of that Province had no more to do with it than the laws of Kentucky have to do with Respondent's cause of action. Aside from the fact that there was a localized tort, that case would be comparable to this if the laws of this country provided a general statute of limitations shorter than Pennsylvania's. But here, there is no such period of limitations to be borrowed.

**(B) The Kentucky Statute of Limitations Would Be Borrowed under the Pennsylvania Act Only if Respondent's Cause of Action Arose under Kentucky Law.**

Petitioner is correct in stating that the statutes of Kentucky require suits on statutory liabilities, if filed in Kentucky, to be commenced within five years after the cause of action accrued, but all discussion of Kentucky procedural or remedial law is completely beside the point here.

Petitioner cites the decision of the District Court in *Anderson* v. *Abbott*, 23 F. Supp. 265 (1939), where, on motions challenging the sufficiency of the Bill of Complaint generally and asserting the defense of limitations, the

court overruled both contentions. Neither in the cause of action before the District Court nor in the instant case is there even a suggestion that Respondent's claim is for a breach of contract, or that it is based upon Banco shareholders' failure to pay at any time or place.

**(C) "The 'Cause of Action'—When It Arose."**

There is no dispute as to *when* Respondent's cause of action accrued and limitations began to run. The date was April 1, 1931. That is only because "suit cannot be instituted prior to the date fixed for payment and a state statute of limitations does not begin to run until that date." *Fisher* v. *Whiton*, 317 U. S. 217, 218. Petitioner's action or non-action had nothing to do with the accrual of the cause of action.

Petitioner is not quite correct in stating that "the *possibility* of statutory double liability as a holder of stock of a national bank first comes into existence upon the acquisition of the national bank stock." *Liability* attaches to the person of a stockholder upon his acquisition of ownership of the stock. That liability matures upon assessment and a perfect cause of action against a stockholder is consummated upon the Comptroller's order to his receiver to enforce it, except for the grace period allowed by the Comptroller, which must expire before the receiver may proceed.

This Court has discussed the nature of the liability on several occasions. *McClaine* v. *Rankin*, 197 U. S. 154, held that the receiver's cause of action does not exist apart from federal statute and that the basis of such cause of action is the Comptroller's order; that the statute of limitations runs "as against an action to enforce the statutory liability and not an action for breach of contract." *Pufahl* v. *Parks*, 299 U. S. 217, 223, held that a stockholder's obligation to pay an assessment is rendered absolute by the Comp-

troller's action in ordering one. "From the moment of the Comptroller's order of assessment, the bank's Receiver has a claim which would support an action of debt at common law against a living stockholder or the executor of a deceased stockholder."

Again, in *Brown* v. *O'Keefe*, 300 U. S. 598, 603, it was said: "Liquidation coupled with insolvency is the critical event which is capable of transforming a potential liability into one presently enforcible as soon as" a receiver appears upon the scene.

These expressions were approved in *Fisher* v. *Whiton*, supra, holding the only factor necessary to the receiver's right to sue, occurring after the order of assessment, is the mere lapse of time. The latter case also held that, until the date fixed for payment by the Comptroller, the receiver does not even have the right to demand payment, demand being used in the sense that it has some consequence in law.

The court, in *Anderson* v. *Abbott*, 321 U. S. 349, 356, indicated that principles of contract law have no application "to suits to enforce a liability which has this statutory origin." The liability of these Banco shareholders is not "bottomed on fault" (p. 366). Their liability arose as "an incidence of ownership" (p. 368).

There was complete agreement in *Anderson* v. *Abbott* on the point that Banco shareholders' liability is neither "bottomed on fault" nor contractual. The dissenting opinion said (p. 380): "We are dealing with a variety of liability without fault," and (p. 372) "On the contrary, by the terms of the stock certificates and by the law of the corporation's being, their shares were fully paid and non-assessable. These stockholders cannot be said in any way to have assumed any express or implied contractual assessment liability."

Petitioner correctly argues that "the statutory provision does not in and of itself create a cause of action." Re-

spondent's cause of action, so far as any activity or non-activity of Petitioner is concerned, consists solely in identifying him as the owner of property carrying with it liability to assessment. No other fact in the Bill of Complaint was issuable. The Comptroller's assessment was a quasi judicial determination and conclusive upon the Petitioner. *Forrest* v. *Jack*, 294 U. S. 158; *Adams* v. *Nagle*, 303 U. S. 532. That conclusive order, under the federal law, was the basis of this action. *McClaine* v. *Rankin*, *Pufahl* v. *Parks* and *Brown* v. *O'Keefe*, *supra*.

Petitioner persists in adverting to tort and contract law—"a cause of action does not arise until a prohibited act is committed or until there is a failure to perform a required act" and in reiterating—"The failure of the duty which gives rise to a cause of action against a shareholder of a national bank is the failure to pay the assessment to the Receiver on the date and at the place fixed for payment." No prohibited act is involved here and "failure to pay" gets into this case solely by way of hypothesis.

It is argued that "the order of the Comptroller applies with equal force to all shareholders, but the Receiver does not have a cause of action against all shareholders." But that is just what the Receiver does have, as soon as the grace period has elapsed. That is what this Court said in the above quoted language from *McClaine* v. *Rankin*, *Pufahl* v. *Parks* and *Brown* v. *O'Keefe*. The passage of time, from the date of the order to the date when the receiver may institute suit, is not confined to any state or country. That grace period is not a condition precedent to suit against stockholders. *Strassburger* v. *Schram*, 93 Fed. (2d) 246 (C. C. A. 3, 1937); *Reich* v. *Van Dyke*, 107 Fed. (2d) 682 (C. C. A. 3, 1939). National bank stockholders are not even entitled to notice of the assessment or demand for payment. *Brown* v. *Ellis*, 103 Fed. 834 (D. C. Vt., 1900); *Rankin* v. *Miller*, 207 Fed. 602, 611 (D. C. Del., 1913);

*Anderson* v. *Banks-Miller Supply Co.*, 60 F. Supp. 97 (D. C. W. Va., 1945).

Petitioner says that Respondent's cause of action arose "when the defendants failed to pay the assessment to the Receiver at his office on or before April 1, 1931" and cites as authority the decision of the District Court in *Anderson* v. *Abbott*, with reference to *when* "that *right* of action accrued." That court said nothing about shareholders' failure to pay or where they were to pay. Time was the point being considered, not place.

**(D) "The 'Cause of Action'—Where It Arose."**

Petitioner represents that "recent decisions of this Court are all to the effect that a cause of action does not arise until a shareholder fails to pay the assessment to the receiver by the date fixed by the Comptroller." It is respectfully submitted that this Court has never so held and the plain implications of its discussion of the nature of shareholders' liability are to the contrary.

*Durham* v. *Spence*, Law Reports Exchequer Cases, Vol. 6, p. 52 (1870-71), is cited for the discussion of an English statute by one of the judges who reasoned that the time when a cause of action arises also determines the place where it arises. Applied to the case of breach of contract before it, the language of that court is correct. There, a resident of the Cape of Good Hope had promised to marry the plaintiff, a resident of Calcutta, India. The executory groom changed his mind, while both parties were in England, and there renounced the contract. He then returned to the Cape where he was served with a writ under an English statute permitting such service in a "cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction." The contract had not been made in England but it was performable in England and had been breached there.

Within the terms of that statute, the court held the writ proper because the cause of action was for breach of contract and the breach occurred in England. In addition to the language quoted by Petitioner, Cleasby, J. said:

> "... if a man enters into a contract which is to be performed in England, he, by his own act, subjects himself to the difficulty and can scarcely complain if he is sued for his default in the place where he has said performance shall be made."

In the instant case, Petitioner contracted that he would not pay an assessment. He never agreed to pay any place and he should not complain if he is sued in the only jurisdiction in which he can be reached. This suit is not for Petitioner's default. It is, in the language of the National Bank Act, to "enforce" his individual liability, by the only means possible, by resort to suit in the district of Petitioner's residence.

1. The Statutory Liability Did Not Arise in Kentucky.

Petitioner contends that his statutory liability arose in Kentucky because the bank was located there, its business was transacted there, it failed there, and the Receiver's office was there. The location of the bank and its business in Louisville, Kentucky, are no more indicative that the liability arose in Kentucky than that it arose in Louisville. Neither the ordinances of Louisville nor the laws of Kentucky touch or concern Petitioner's liability. The bank is not suing and the recovery is not for its benefit. The Receiver sues as an officer and agent of the United States, serving as a trustee for persons who were creditors of the defunct bank. *Auten* v. *U. S. Natl. Bank*, 174 U. S. 125. Petitioner's liability was advanced toward maturity as a result of the bank's failure to pay, but that liability still "is collateral and statutory." The law imposed liability on Petitioner, secondary to the bank's debts, which remained

> that the government of the Union, though limited in powers, is supreme within its sphere of action" (p. 404).

*Anglo-American Land Co.* v. *Lombard*, 132 Fed. 721 (C. C. A. 8, 1904) is cited for the proposition that "the place where a cause of action arises is not determined by inquiring where it may be enforced." In that case all parties were non-residents of Kansas. Suit was filed in the District Court of Kansas to enforce the liability of the stockholders of a Kansas corporation, a state created liability. Certain of the defendants, described in the opinion as the "Ramsden cases," were denied the defense of the Kansas statute of limitations because of another Kansas statute which tolled its running while the obligor was beyond the reach of its courts (132 Fed. 739, 740). On rehearing, it appeared that the Ramsden defendants sought the benefit of a shorter period of limitations of some other state, under the Kansas borrowing statute. The court held that the cause of action arose in Kansas, not where the defendants resided, and hence refused to apply the borrowing statute. It differs from the Pennsylvania statute in that it was applicable only where the case was between non-residents of Kansas. The Kansas borrowing statute sensibly recognized the injustice of permitting residents of that state to borrow the remedial law of some other state where they had never been amenable to suit. The court also said:

> "The constitution and laws of Kansas, operating upon conditions and occurrences within that state, gave the right to sue; and whether and when it shall be barred in the courts of that state is a matter of concern to that state, irrespective of the residence of the parties."

Here the laws of Kentucky do not give the right to sue. Enforcement of the federal right is of concern to Kentucky only when the aid of its courts is sought.

Petitioner cites one tort and two contract cases as authorities for the proposition that a cause of action arises at the place where a prohibited act is performed or where a required act should have been performed. Borrowing statutes were applied in each of those cases. In *Pond Creek Mill & Elevator Co.* v. *Clark*, 270 Fed. 482 (C. C. A. 7, 1920), the action was filed in Illinois for breach of a contract made in Oklahoma. Plaintiff contended that performance was due in Illinois, that the breach occurred there, and that therefore Illinois law controlled. Defendant contended that delivery to a common carrier in Oklahoma was delivery to plaintiff and that Oklahoma law, with a shorter period of limitations, controlled. It was held that the breach of contract occurred in Oklahoma and that the cause of action arose there. Defendant was a resident of Oklahoma and could have been sued in the state whose limitations was borrowed. In *B. & O. R. Co.* v. *Reed*, 223 Fed. 689 (C. C. A. 6, 1915), the Ohio District Court borrowed the Indiana statute of limitations in a tort action for damages for personal injuries sustained in Indiana. The court commented:

> "The conclusion is inevitable that it was competent at all times for the plaintiff below to have sued the company in Indiana."

In *Auglaize Box Board Co.* v. *Kansas City Fiber Box Co.*, 35 F. (2d) 822 (C. C. A. 6, 1929), Kansas law controlled because the buyer under an executory sales contract, committed an anticipatory breach of the contract there. The Ohio court therefore borrowed the Kansas period of limitations. The buyer's place of business was Kansas City and it was suable there.

Not only do we not have here an action for breach of contract or for tort, but in each of the foregoing three cases, Petitioner cites the action was brought in a jurisdiction other than that of the defendant's domicile for the obvious

purpose of avoiding the bar of the statute of limitations of the state where the wrong had been done and where the defendant was suable.

Petitioner cites three cases to support the contention that a cause of action upon a liability created by a federal statute arises in the state where the operative facts occurred. *Bluefields S. S. Co.* v. *United Fruit Co.*, 243 Fed. 1 (C. C. A. 3, 1917), was an action for damages under the Sherman Act. The court did not decide where the cause of action arose. The trial court held the cause barred by the law of the forum, the Pennsylvania six-year general statute of limitations. The Court of Appeals affirmed, though the damages, the "operative" facts, occurred in Louisiana. It is significant that the plaintiff receiver in that case carefully selected the jurisdiction in which to sue "and was induced by the liberality of the Pennsylvania Act to bring it in the District of Pennsylvania, as shown by his petition to the District Court for Louisiana. . . ."

Petitioner next relies on *Hansen Packing Co.* v. *Swift & Co.*, 27 Fed. Supp. 364 (D. C. N. Y. 1939), an action under the federal anti-trust laws. The plaintiff, a Montana corporation, suffered damages in Montana by reason of a price war conducted wholly in that state by defendant's method of doing business there. The New York Court borrowed the Montana period of limitations because defendant's tortious conduct occurred in Montana, noting also that under the Clayton Act, Swift & Company could have been sued in Montana. The Act permits suit either in the district of wrongdoer's residence or where it transacts business. 15 U. S. C. A. § 22. Furthermore, the federal anti-trust laws do not preempt the field. State laws may regulate the same conduct. *Puerto Rico* v. *Shell Co.*, 302 U. S. 253.

Petitioner next cites *Smith* v. *Continental Oil Co.*, 59 Fed. Supp. 91 (D. C. N. Y. 1945), an action under the Fair Labor Standard Act of 1938. Causes of action under that Act

arise under state laws because they are based upon contracts of employment properly within the sphere of state law. In the *Smith* case, the suit was on a simple contract of employment made and performed in Oklahoma. The New York court held the cause of action arose there. Plaintiff sued in New York rather than in Oklahoma because he had permitted that state's period of limitations to expire. It was noted by the court that the defendant was at all times qualified to do and actually was doing business in Oklahoma at the very office where the plaintiff had worked. Plaintiff could have sued in Oklahoma. The only effect of federal law in that case was to add to the terms of an express contract and the parties necessarily entered into that contract with such terms in mind. See *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 583; *Rigopoulos* v. *Kervan*, 53 Fed. Supp. 829 (D. C. N. Y. 1943); *Northwest Yeast Co.* v. *Broutin*, 133 F. (2d) 628 (C. C. A. 5, 1943); *Keen* v. *Mid-Continent Petroleum Corp.*, 58 Fed. Supp. 915 (D. C. Iowa 1945).

2. Kentucky Was Not the Place of Performance.

Petitioner states that it is immaterial whether the liability here sought to be enforced is purely statutory or contractual, since in either event, the place of performance was Louisville, Kentucky. But only principles of contract law are urged upon the court. The nature of the liability would seem to have been unequivocally established as purely statutory by the decision of this Court in *Anderson* v. *Abbott*, 321 U. S. 349, with which the court below agreed.

None of the authorities cited in this subdivision of Petitioner's brief even touch upon place of performance by persons liable to assessment as shareholders of national banks. Petitioner merely avers that "the breach of duty (failure to pay the assessment) which created the cause of action occurred in the State of Kentucky." Where, may we ask, can we find any reference to breach of duty as an

element of Respondent's cause of action, except in the arguments of Banco shareholders and the decision of the Sixth Circuit in the *Helmers* case. The motion, which Petitioner contends should be granted, is that the Bill of Complaint shows upon its face that the cause of action arose in Kentucky. His brief insists that he failed to pay in that state and that such nonfeasance is a most material factor in a cause of action which does not even refer to that subject.

A cause of action comprises "every fact a plaintiff is obliged to prove in order to obtain judgment, or, conversely, every fact the defendant would have the right to traverse." *Railway Co.* v. *Dixon*, 179 U. S. 131, 139. See also *Martin* v. *N. & W. R. Co.*, 43 F. (2d) 293, 295 (C. C. A. 4th, 1930). Petitioner concedes the cause, as pleaded, to be legally sufficient.

This contention, that failure to pay is the cause of action, also flies in the face of the accepted rule that payment is an affirmative defense. Had the Bill included an allegation that Petitioner had failed or defaulted in payment, no *proof* of such allegation would be necessary and it would not be put in issue by a denial. See Note 100 A. L. R. 264; *Kallock* v. *Hoaglund*, 239 Fed. 252 (C. C. A. 6, 1917); Rule VIII Federal Rules of Civil Procedure. Non-payment cannot generate a cause of action. Payment, if pleaded and proven, will defeat a cause of action. It will not do to say if Petitioner had paid, he would not be sued and that therefore, his failure to pay is either the whole or a material part of the cause of action. There is frequently a dispute over payment and if, in fact, payment of an obligation has been made, the obligor must plead and prove that fact or he may be compelled to pay again.

The effect of the argument,—that failure to pay was an essential element of the cause of action and that that suppositious fact localized the cause of action within the State of Kentucky,—is to hold Respondent's failure to negative

a possible defense, has resulted in his Bill of Complaint stating no cause of action. It is all the more startling coming from one who admits the cause alleged is good though it is silent on this subject.

The law provides no place of performance for a national bank shareholder's liability of assessment. The Comptroller named none. Certainly the Receiver had no power to unilaterally "fix" a place for performance which Banco shareholders were bound to recognize. Here Petitioner was a shareholder of a Delaware corporation and not only is there an absence of any agreement to pay but he contracted against liability and steadfastly denied any obligation to pay. It would seem that the Receiver's demand on Banco shareholders, had there ever been one, to pay in Louisville, should be no more effective in localizing his cause of action in a suit to enforce payment than it was in securing it.

### 3. The District of Columbia.

Respondent finds no suggestion in the opinion of the court below that his cause of action may have arisen in the District of Columbia. The language quoted, regarding the offices at which payment might have been accepted,—that is, the Receiver's office or the Comptroller's office,—was used in response to Petitioner's theory of "place of performance." The court below might well have said that, accepting Petitioner's theory, had the Receiver indicated willingness to receive payment in Miami, Florida, the statute of limitations of that state should be borrowed.

Respondent is in complete agreement with Petitioner's statement that "the location of the offices of the Comptroller General and of the United States Treasury in the District of Columbia is not sufficient basis for holding the present cause of action arose in the District of Columbia." That is "the Seat of the Government of the United States." U. S. Const., Art. 1, § 8, Cl. 17. So there is no occasion to answer

Petitioner's extended discussion of the limitations of the District of Columbia or the question whether the District is a state.

**(E) The Court of Appeals Applied the Law of the Forum.**

Petitioner contends that the language quoted from the lower court's opinion "would mean that no state statute of limitations is applicable" (B., p. 23). The court stated:

> "The applicable statute of limitations in Pennsylvania is six years" (R. 60).

It is submitted that the language of the court below is not a "new" approach and that the decision of *Holmberg* v. *Armbrecht*, 327 U. S. 392 is pertinent here because the liability there sought to be enforced was also a federally created right, as distinguished from a state created right. Whether the right be legal or equitable, the principle—that matters within the exclusive reach of federal substantive law are unaffected by state substantive law—applies. It is the same principle that was discussed in the concurring opinion in *D'Oench Duhme & Co.* v. *F. D. I. C.*, 315 U. S. 347, 447, where it was said that the federal question involved was not

> "to be answered from considerations of geography. That a particular state happened to have the greatest connection, in the conflict of laws sense, with the making of the note involved, or that the subsequent conduct happened to be chiefly centered there, is not enough to make us subservient to the legislative policy or the judicial views of that state."

In that case there was substantive state law on the subject. In the instant case there is no Kentucky substantive law on the subject.

The principle that state law is excluded from the field occupied by federal law is not new: It is as old as the Con-

stitution and was fully discussed in *McCulloch* v. *Maryland, supra*.

Only a few weeks ago this Court again considered the impact of federally created rights on private contracts, contracts within the proper sphere of state law. In *Vanston Bond Holders Committee* v. *Green*, 15 U. S. L. W. 4063, the question arose as to whether bondholders of a bankrupt Delaware corporation were entitled to interest on interest, for which explicit provision was made in their contract. The contract was made in New York and performable in New York. Interestingly, too, the bankrupt's business and property, as well as the property encumbered by the bonds, were in Kentucky. The Kentucky District Court allowed the claim applying its ideas as to the law of New York. The Sixth Circuit Court of Appeals [151 F. (2d) 417] reversed, finding the obligation invalid under New York law. This Court affirmed but disagreed with the Circuit Court in its reasoning, expressing its views in two opinions.

The first opinion noted the significant contacts the situation had with state laws, but concluded that the decision should turn on whether the allowance of the claim would be compatible with the policy of the national law,—that its allowance was not in accord with equitable principles governing distributions in bankruptcy.

In the second opinion it is said:

> "Of course, where *rights* are created by the constitution, treaties or statutes, of the United States and do not owe their origin to the laws of any state, the granting or withholding of interest as part of the remedy *is also* a function of the federal law."

Commenting on *Board of Commissioners* v. *United States*, 308 U. S. 343, it is said:

> "The factors legally decisive of the present problem are the opposite of those which controlled our decision in that case. *There we had a right created by federal*

*law.* In this case, it was beyond the power of federal law to create the right for which claim was made. . . .

". . . Obligations to be satisfied out of the bankrupt's estate thus arise, if at all, out of tort or contract or *other relationship created under applicable law. And the law that fixes legal consequences to transactions is the law of the several states. Except for the very limited obligations created by Congress* e. g. *Holmberg* v. *Armbrecht,* 327 U. S. 392, *a debt is not brought into being by federal law.* . . . And clarity of analysis justifies *repetition* that *except where federal law,* wholly apart from bankruptcy, *has created obligations* by the exercise of power granted to the federal government, a claim implies the existence of an obligation created by state law.

". . . And no obligation finds its way into a bankruptcy court unless by the law of the state where the acts constituting a transaction occur, the legal consequence of such a transaction is an obligation to pay. (Citing cases.) Where a transaction in its entirety occurs in one state, it is clearly the law of that state that determines if an obligation is born, whether the question becomes relevant in a bankruptcy court or in any other court. But the mere fact that an agreement was made in one state by citizens of a second state for performance in a third, and affecting individuals in all 48 states, does not change the principle inherent in our federal scheme, that the existence of a debt comes about, not by federal law, but by force of some state law, even though the right to enforce the debt, if it exists, may raise federal questions if bankruptcy ensues. Bankruptcy legislation is superimposed upon rights and obligations created by the laws of the state."

Federally created rights are above and beyond the reach of state law and when federally created obligations find their way into the courts, the laws of the state where the acts constituting the transaction occur have nothing to do with their legal consequences. Where, as here, the existence

of an obligation comes about by federal law, the principle inherent in our federal scheme is that considerations of state substantive law are excluded.

If all the incidents giving rise to a common law action for breach of contract or tort occurred in Louisville, their legal consequences, of course, would have to be determined by the law of the state and would attach to the wrongdoer in any court. In such an instance, the territorial boundaries of the City of Louisville or the County of Jefferson would have no meaning because lacking in legal effect. Exactly the same situation is presented here. The cause of action arose within the country because generated by its laws. Whether the Comptroller was in the District of Columbia when he ordered the assessment, whether the bank was located in Louisville, Kentucky, whether the Receiver requested payment there, or whether Petitioner decided not to pay while "at his home—Dimock, Susquehanna County, Pennsylvania," may be of interest geographically, but the "state or country in which" the Receiver's cause of action arose must be determined by the *law* of the latter.

## CONCLUSION

The so-called borrowing statute of limitations of Pennsylvania, and the comparable statute of Ohio, though not identical in language, have the same intent. The Pennsylvania Act states:

> "when a cause of action has been fully barred by the laws of the state or country in which it arose. . . ."

The Ohio statute reads:

> "if the laws of any state or country where the cause of action arose limits the time. . . ."

It must be conceded that the assessment sued on in this case, and in the Ohio case, arose under and by virtue of

the laws of the United States. It was brought into existence as a debt or claim by an act of an officer of the United States. In *Rawlings* v. *Ray*, 312 U. S. 96, at p. 99, Chief Justice Hughes stated:

> "We observed that the contingent obligation of a stockholder to pay an assessment was rendered absolute by the Comptroller's action in ordering one and that from the moment of the order of assessment the Receiver had a claim which would support an action at common law against a living stockholder or the executor of a deceased stockholder."

In *Fisher* v. *Whiton*, 317 U. S. 217, Mr. Justice Murphy stated:

> "'The question as to the time when a complete and present cause of action arises in the Receiver to enforce that liability by suit is a Federal question."

It must be conceded also that the laws of the United States did not "fully bar," to use the Pennsylvania language, or "limit the time," the significant language in the Ohio statute, for the commencement of the action to a less number of years than the applicable Pennsylvania or Ohio general limitation statute. It is submitted, therefore, that the general limitation statutes of Pennsylvania and Ohio, six years, is controlling and that neither state is justified in disregarding its own general statutes and borrowing the five-year statute of Kentucky because the laws of Kentucky had nothing whatever to do with creating the debt or claim, it being a Federal right in all respects.

If the Federal statute had "barred" or "limited" suit on the assessment in five years, a Pennsylvania or Ohio forum would properly disregard its six-year general statute and borrow the Federal five-year statute. There is no justification whatever to borrow a limiting statute of a third jurisdiction (Kentucky) which is neither the forum nor the

place under whose laws the debt, claim, or cause of action was created.

The Petitioner in this case and the Respondents in the Ohio case assert that the cause of action arose in Kentucky because the assessment was payable in Kentucky. It was not payable in Kentucky. No place of payment was fixed in the order of assessment. No demand was made upon the stockholders of BancoKentucky by the Receiver until the suit was filed. No such demand is necessary. The only notice given to the stockholders of Banco by the Receiver was that he expected to hold them liable in the event he was unable to collect from Banco, a corporation. In this notice the Receiver did not fix the amount of his claim nor the place of payment.

What is a cause of action? The definitions are numerous. 45 Harv. L. Rev. 802. A cause of action seems to be the "aggregate of operative facts" necessary to establish the plaintiff's debt or claim. That is a matter of substantive law. Concededly the debt arose in this case *when* the Comptroller levied the assessment and this Court has so held. The right to sue on that debt or claim is procedural. In the instant case, as in *Rawlings* v. *Ray* and *Fisher* v. *Whiton, supra*, the debt or cause of action arose *when* the Comptroller levied the assessment but by the very terms of that assessment the right to sue thereon was postponed from February 20th to April 1st. The postponement by the Comptroller of the right to sue on the debt has also been held by this Court to be a matter of federal law.

If no time for payment in futuro had been fixed, the cause of action would undoubtedly have ripened to a right of action. Can it be said that because the assessment order made the assessment payable after the date of the order, that the cause of action had not arisen before the expiration of that period. Is it not more correct to say that the cause of action had arisen on February 20th when the debt was

matured by the order of the Comptroller but that the right to sue—a right of action thereon—was postponed?

It is respectfully submitted that the debt sued on was matured when the order was made; that the cause of action arose under the laws of the United States, not under the laws of Kentucky. It is submitted further that the Comptroller's order postponing the time of payment affected the right to bring the action but did not affect the cause of action itself.

In the opinion of Mr. Chief Justice Hughes in the *Rawlings* v. *Ray* case and the opinion of Mr. Justice Murphy in the *Fisher* v. *Whiton* case, both use the phrase "a complete and present cause of action." It is submitted that the cause of action sued on in this case was complete when the Comptroller levied the assessment, and was a complete and present right of action except for the grace period.

It is respectfully submitted that the judgment below should be affirmed.

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WM. C. KELLY,
*Counsel for Respondent.*

# SUPREME COURT OF THE UNITED STATES

Nos. 593 AND 656.—OCTOBER TERM, 1946.

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|---|---|
| Francis R. Cope, Jr., Petitioner,<br>593 *v.*<br>A. M. Anderson, Receiver of the National Bank of Kentucky. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit. |
| A. M. Anderson, Receiver of the National Bank of Kentucky, Louisville, Kentucky, Petitioner,<br>656 *v.*<br>Lawrence S. Helmers, Lewis Levi, Oscar Schwartz, Alice Sterne. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. |

[June 2, 1947.]

MR. JUSTICE BLACK delivered the opinion of the Court.

In *Anderson* v. *Abbott*, 321 U. S. 349, we held that the shareholders of BancoKentucky Company, a bank-stockholding company, were liable under 12 U. S. C. §§ 63, 64, for an assessment on shares of an insolvent national bank held in the portfolio of the holding company. That suit was brought in a Kentucky District Court against Banco stockholders residing in that District. These suits in equity were brought in Federal District Courts in Ohio and Pennsylvania to enforce assessments against Ohio and Pennsylvania stockholders of Banco. In No. 656 the District Court in Ohio overruled a motion to dismiss made on the ground, among others, that the bill showed on its face that the action was barred by an Ohio statute of limi-

tations.[1] The Sixth Circuit Court of Appeals reversed. 156 F. 2d 47. In No. 593 the Third Circuit Court of Appeals reversed the decision of the District Court in Pennsylvania which had held the action there barred by the Pennsylvania statute of limitations. 156 F. 2d 972. We granted certiorari to consider both cases. — U. S. —.

There is no federal statute of limitations fixing the period within which suits must be brought to enforce the statutory double liability of shareholders of insolvent national banks. For this reason we look to Ohio and Pennsylvania law to determine the period in which these suits may be brought. *McDonald* v. *Thompson*, 184 U. S. 71; *McClaine* v. *Rankin*, 197 U. S. 154, 158; *Rawlings* v. *Ray*, 312 U. S. 96, 97. Even though these suits are in equity, the states' statutes of limitations apply. For it is only the scope of the relief sought and the multitude of parties sued which give equity concurrent jurisdiction to enforce the legal obligation here asserted. And equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy. *Russell* v. *Todd*, 309 U. S. 280, 289 and cases cited. See also *Guaranty Trust Co.* v. *York*, 326 U. S. 99; *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395–396.

But even though the period in which suit must be brought is governed by state limitations statutes, we have previously decided that the question of when the applicable state statute of limitations begins to run depends upon when, under federal law, the Comptroller of the Currency, or his authorized agent, is empowered by federal law to bring suit. And the Comptroller's agent,

[1] For convenience, the motion was made by only four defendants who are respondents here. The case was continued as to the others pending final disposition of the question concerning the statute of limitations, the only ground of the motion to dismiss upon which the District Court passed.

the Receiver here, could not bring these actions until the date for payment fixed by the Comptroller. *Rawlings* v *Ray, supra*, 98, 99; *Fisher* v. *Whiton*, 317 U. S. 217, 220, 221. The date for payment fixed by the Comptroller in this instance was April 1, 1931. These actions were instituted more than five but less than six years after the payments became due under the Comptroller's assessment order.

With regard to No. 656, the Ohio proceeding, the Ohio statute of limitations provides that suit "upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued." Ohio Gen. Code (Page, 1939) § 11222. This statute describes the liability sued on here, and if applicable does not bar this suit. But the scope of this general provision is narrowed by another known as the "borrowing statute" which reads:

> "If the laws of any state or country where the cause of action arose limits the time for the commencement of the action to a less number of years than do the statutes of this state in like causes of action then said cause of action shall be barred in this state at the expiration of said lesser number of years." Ohio Gen. Code (Page, 1939) § 11234.

If the cause of action arose in Kentucky, the "borrowing statute" applies Kentucky's statute of limitations, and this suit is barred. For Kentucky's law requires that an "action upon a liability created by statute . . . shall be commenced within five years after the cause of action accrued." Ky. Rev. Stat. (Baldwin, 1943) § 413.120.

The Receiver contends that the Ohio borrowing statute's language "the laws of any state or country where the cause of action arose" has reference to "a system of jurisprudence other than Ohio's," and does not refer "necessarily to territorial limits" within which events occurred

giving rise to an enforceable obligation. The place where the events giving rise to a cause of action occur is said to be "important only insofar as the laws of that place are controlling." Under this argument, the cause of action here could not have "arisen" in any state since the statutory obligation of shareholders was not imposed or controlled by state law. Hence, the argument runs, the Ohio law did not contemplate borrowing any state statute of limitations in a case where liability is governed by federal law. And no federal statute of limitations could be borrowed in this case for none existed. Therefore, it is argued, only Ohio's general six-year statute of limitations applies.

The consequence of accepting this contention would be that the Ohio borrowing statute would have no effect at all as to suits brought in Ohio state courts to enforce actions authorized by federal law. For, of course, Ohio courts could never borrow a non-existent federal statute of limitations. And if there were a federal statute of limitations governing a federally created right, that statute would control of its own force. *Herget* v. *Central National Bank & Trust Co.*, 324 U. S. 4. We have been cited to no decision by any Ohio court which would lead us to believe that its borrowing statute should be given such a sterilizing interpretation. *Cf. Townsend* v. *Eichelberger*, 51 Ohio St. 213, 216, 38 N. E. 207, 208.

We find it unnecessary to our decision to discuss the contentions made here concerning differences between a "cause of action" and a "liability." The Ohio Supreme Court has itself said that a "cause of action is the fact or combination of facts which gives rise to a right of action, the existence of which affords a party a right to judicial interference in his behalf." *Baltimore & O. R. Co.* v. *Larwill*, 83 Ohio St. 108, 115–116, 93 N. E. 619, 621. We have been referred to nothing in Ohio statutes or decisions which indicates that it used "cause

of action" in any different sense in its borrowing statute. The purpose of the state's borrowing statute[2] as those of other states,[3] was apparently to require its courts to bar suits against an Ohio resident if the right to sue him had already expired in another state where the combination of circumstances giving rise to the right to sue had taken place. Moreover, limitations on federally created rights to sue have similarly been considered to be governed by the limitations law of the state where the crucial combination of events transpired. *Seaboard Terminals Corp.* v. *Standard Oil Co.*, 24 F. Supp. 1018, 104 F. 2d 659; *Bluefields S. S. Co.* v. *United Fruit Co.*, 243 F. 1, 19–20. See *Campbell* v. *Haverhill*, 155 U. S. 610; *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 397.

Our appraisal of the Ohio borrowing statute, the opinions of the courts of that state, and the circumstances leading to this suit, persuade us that the cause of action "arose" in Kentucky within the meaning of the Ohio borrowing statute. The bank was authorized to do its banking business in Louisville and did business in no other place. See 12 U. S. C. § 81. Nor was this bank's business any the less local, because its shares were held in the portfolio of a Delaware corporation. Many provisions of federal law make national banks, in important aspects, peculiarly local institutions. See 12 U. S. C. §§ 30, 33, 34 (a), 36, 51, 62, 72. For jurisdictional purposes, a national bank is a "citizen" of the state in which it is established or located, 28 U. S. C. § 41 (16), and in that district alone can it be sued. 12 U. S. C. § 94. True, when insolvency occurs, there is a shift in bank management, but the bank's activities are still necessarily rooted in its local habitat. In this case the Receiver's office was located in Louisville, the home of the bank; payment of assessments,

[2] See 25 Ohio Jurisprudence (1932), 435–440.

[3] See Note, 75 A. L. R. 203 (1931); Note, 35 Col. L. Rev. 762 (1935).

like other obligations due the bank, could have been made there, and, in fact, shareholders were notified by the Receiver to pay at his office in Louisville.* Liquidation of a local bank, like its daily operations, must from necessity and in the interest of good business be carried on, in the main, in the community where the bank did business with its depositors and other customers. Practically everything that preceded the final fixing of liability of shareholders derived from Kentucky transactions. We have been referred to no Ohio decisions, and have been unable to find any, which contradict our conclusion that events which culminated in this suit justify our holding that this "cause of action" "arose" in Kentucky within the meaning of the Ohio statute. See *Hunter* v. *Niagara Fire Ins. Co.*, 73 Ohio St. 110, 76 N. E. 563; *Alropa Corp.* v. *Kirchwehm*, 138 Ohio St. 30, 33 N. E. 2d 655; *Payne* v. *Kirchwehm*, 141 Ohio St. 384, 48 N. E. 2d 224; *Bowers* v. *Holabird*, 51 Ohio App. 413, 1 N. E. 2d 326; *National Bondholders Corp.* v. *Stoddard*, 22 Ohio O. 145. See also *Hilliard* v. *Pennsylvania R. Co.*, 73 F. 2d 473, 475–476; Note, 15 U. of Cin. L. Rev. 337 (1941); Note, 21 Ohio O. 107 (1941). Therefore the judgment in No. 656 is affirmed.

In No. 593, the Pennsylvania action, the same considerations are controlling. The general statute of limitations of that state which would be applicable to this action had it arisen in Pennsylvania, like Ohio's general statute, provides a six-year period in which this suit could be brought. 12 Pa. Stat. § 31 (Purdon, 1931). But Pennsylvania also has a "borrowing statute" which provides: "When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought

*Whether notice by the Receiver to pay at a particular place would alter the conclusive situation as to where a cause of action might be considered to "arise" under other circumstances is a question we need not decide.

in any of the courts of this commonwealth." 12 Pa. Stat. § 39 (Purdon, 1931). Our review of Pennsylvania decisions construing this statute persuades us that the borrowing statute is applicable to this case, that under that statute this cause of action "arose" in Kentucky, and that the five year statute of Kentucky bars this action. See *Mister* v. *Burkholder*, 56 Pa. Super. 517; *Fletcher's Estate*, 45 Pa. D. & C. 673, 674; *Bell* v. *Brady*, 346 Pa. 666, 31 A. 2d 547; *Shaffer's Estate*, 228 Pa. 36, 40, 76 A. 716, 717. *Cf. Rosenweig* v. *Heller*, 302 Pa. 279, 153 A. 346. See also Notes, 88 U. of Pa. L. Rev. 878 (1941), 4 U. of Pitt. L. Rev. 215 (1938). The judgment of the Circuit Court of Appeals in No. 593 is therefore reversed.

*So ordered.*

THE CHIEF JUSTICE took no part in the consideration or decision of these cases.

CLERK'S COPY.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1946

## No. 656

A. M. ANDERSON, RECEIVER OF THE NATIONAL BANK OF KENTUCKY, LOUISVILLE, KENTUCKY, PETITIONER,

*vs.*

LAWRENCE S. HELMERS, LEWIS LEVI, OSCAR SCHWARTZ, ALICE STERNE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 28, 1946.

CERTIORARI GRANTED DECEMBER 9, 1946.

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# District Court of the United States

SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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A. M. ANDERSON, RECEIVER OF THE NATIONAL BANK OF KENTUCKY,

*Plaintiff,*

v.

CHARLES W. ADLER, LAWRENCE S. HELMERS, OSCAR SCHWARTZ, ALICE STERNE, LEWIS LEVY and 300 others,

*Defendants.*

---

**BILL OF COMPLAINT**

Filed December 12, 1936

**No. 1001**
**In Equity**

**I.**

The National Bank of Kentucky is a national banking association organized under the laws of the United States, commonly known as the National Bank Act, and is domiciled at Louisville, Jefferson County, in the Western District of Kentucky.

**II.**

Said Bank was closed by resolution of its Board of Directors on the 16th day of November, 1930.

**III.**

Thereafter on November 17, 1930, the Comptroller of the Currency of the United States, being satisfied from information on file in his bureau, that said National Bank of Kentucky located in the City of Louisville, County of

Jefferson and State of Kentucky, was insolvent and unable to pay its just and legal debts, and in pursuance of the power and authority vested in him by law and under the provisions of Section 1 of the Acts of Congress— "An act authorizing the appointment of receivers for national banks and other purposes," approved June 30, 1876, appointed Paul C. Keyes Receiver of said National Bank of Kentucky with all the powers, duties and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a receiver. Said Paul C. Keyes thereupon duly qualified and entered upon the duties of his office as such receiver and took possession of all of the books, records and assets of said Bank and continued in the possession and control thereof as such Receiver until December 15, 1932, on which date he resigned. Thereafter on December 15, 1932, F. G. Awalt, then acting Comptroller of the Currency pursuant to the power and authority vested in him by law as aforesaid, appointed the plaintiff, A. M. Anderson, Receiver of said National Bank of Kentucky with all the powers, duties and responsibilities given to or imposed upon a receiver under the provisions of the Revised Statutes of the United States which authorizes the appointment of a receiver, and the said plaintiff forthwith qualified and thereupon entered upon the duties of his office as such Receiver, took possession of all of the books, records and assets of said Bank. Plaintiff still is in the possession and control thereof as such Receiver and is still the duly appointed, qualified and acting Receiver of said The National Bank of Kentucky.

**IV.**

This is a suit of a civil nature in equity brought by the plaintiff as receiver of an insolvent national bank. As such receiver he is an officer of the United States. This suit arises under the constitution and laws of the United States for the enforcement of a liability imposed by the laws of the United States and is brought in performance of his official duties. This is a case for winding up the affairs of a national banking association.

This suit is brought in equity for the reason that the plaintiff does not have an adequate remedy at law because an accounting is necessary and prayed for herein to determine the proportionate part of the aggregate liability claimed against the defendants named herein for which each individual is severally liable and to determine the credit to which the defendants may be entitled, if any, by reason of the collections made by the plaintiff on account of the statutory liability hereinafter set forth. The matters set forth herein involve complicated interests and degrees of interest among approximately six thousand stockholders of BancoKentucky Company hereinafter described and to require the plaintiff to proceed at law would involve several thousand independent actions in which the defendants and all of said stockholders have a common interest. The equitable determination in one action of the questions of common interest will avoid a multiplicity of suits and circuity of actions and the unreasonable expense of thousands of separate suits which would dissipate the trust fund herein sought to be recovered for the benefit of creditors of said Bank, and unless the plaintiff is granted the relief in equity as prayed for herein, he will suffer irreparable damage and injury.

On account of all of which the plaintiff has no adequate remedy at law and this court has jurisdiction of this suit.

V.

The defendants are named in the caption hereof and the names of said defendants are incorporated in the body of this complaint by reference to the caption hereof, the same as if fully set forth herein and are not repeated to prevent unduly encumbering the record.

The defendants are citizens and residents of the State of Ohio.

The corporate defendants are either corporations organized and existing under the laws of the State of Ohio or are corporations organized and existing under the laws of other states which have qualified to do business in the State of Ohio and are engaged in business therein.

Certain defendants are sued in a representative capacity, as fully set forth in the caption incorporated herein by reference thereto. Certain other defendants, as indicated in Exhibit A by legend distributee of the estate of a named person have received assets from the estate of the named deceased persons who were during their lifetime liable as hereinafter set out, or from estates which were liable as hereinafter set out and such persons named as distributees are liable to the extent of the assets received by them from such estates.

VI.

On or about the 20th day of February, 1931, J. W. Pole, as the Comptroller of the Currency of the United States, upon an accounting by Paul C. Keyes as Receiver of the National Bank of Kentucky, and upon a valuation of the uncollected assets of said Bank remaining in the

hands of Paul C. Keyes as Receiver, found to the satisfaction of the Comptroller of the Currency that in order to pay the debts of the National Bank of Kentucky, it was necessary to enforce the individual liability of the stockholders thereof to the extent hereinafter mentioned as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States, Section 1c156, Act of June 30, 1876 and Section 23, Act approved December 23, 1913 known as the Federal Reserve Act, and said Comptroller of the Currency, by virtue of the authority vested in him by law, did therefore levy and make an assessment and requisition upon the shareholders of said The National Bank of Kentucky for $4,000,000.00, to be paid by them on or before the First day of April, 1931, and did make demand upon each and every one of them for the par value of each and every share of the capital stock of said association held or owned by them respectively, at the time of its failure; and said Comptroller of the Currency did thereupon direct the Receiver of the National Bank of Kentucky to take all necessary proceedings by suit or otherwise to enforce the individual liability of said shareholders.

**VII.**

At the time of the closing of the National Bank of Kentucky, it had issued and outstanding 40,000 shares of capital stock of the par value of $100. each, and 39,820 of said shares were held by Henry Vogt, Thomas J. Minary, Stewart E. Duncan, Allen P. Dodd, Charles H. Bohmer and Ben J. Metcalfe, as Trustees under a certain trust agreement dated April 22, 1927, entered into between the owners and holders of the capital stock of the National Bank of Kentucky and the owners and holders of the capital stock of the Louisville Trust Company. At the

time of the closing of the National Bank of Kentucky, in addition to the stock of the National Bank of Kentucky, the above mentioned Trustees held under the same trust agreement 17,235 shares of the capital stock of the Louisville Trust Company.

## VIII.

Pursuant to the terms of said trust agreement, the above mentioned trustees issued to each stockholder of the National Bank of Kentucky and to each stockholder of the Louisville Trust Company whose stock was deposited with said trustees, a transferable Trustees Participation Certificate having a par value of $100. in lieu of each share of stock of the bank or trust company having a par value of $100. Said Trustees Participation Certificate certified that the holder was the owner of shares of stock of the par value of $100. each, of the indivisible trust estate consisting of the shares of the capital stock of the National Bank of Kentucky and the Louisville Trust Company and of any other corporation acquired by the trustees under the agreement between the stockholders of said institutions previously described. This certificate was issued under the terms of the aforesaid agreement and the holder thereof, by accepting the same, consented to and adopted the terms of the certificate and the terms of the agreement, as if fully written in said certificate.

Subsequent to April 22, 1927, each share of the trust estate having a par value of $100. per share, was divided into ten shares of the trust estate, each having a par value of $10.00 per share but except for the change in par value, said Trustees Participation Certificates remained unchanged and were issued under and subject to the trust agreement dated April 22, 1927.

Each Trustees' Participation Certificate having a par value of $10.00 represented .0697923 of a share of the capital stock of the National Bank of Kentucky, having a par value of $100. per share.

## IX.

Each and every Trustees Participation Certificate contained on the face thereof a statement that it was issued pursuant to the trust agreement of April 22, 1927 which was recited to be on file with said National Bank of Kentucky and each and every Trustees Participation Certificate contained on its face the further agreement assented to by the holder thereof and reading as follows:

> "This certificate is issued under the terms of the aforesaid agreement and the holder hereof by accepting same, consents to and adopts said terms as if fully written herein."

One of the terms of said trust agreement of April 22, 192[redacted] which the above assent was given by the holders of Trustees Participation Certificates, reads as follows:

> "(1) The Trustees shall not be responsible for any acts done by them as Trustees in good faith and in the exercise of an honest judgment. No Trustee shall be liable for the act or omission of another Trustee.
>
> "(2) They shall not be liable, except as Trustees to the extent of the Trust funds held by them by reason of the ownership of stock in any corporation. They shall be indemnified against any such liability by each holder of Trustees' Participation Certificates to the extent hereinafter set forth.
>
> "(3) Each owner of a Trustees' Participation Certificate issued hereunder shall be subject to the same liability thereon as he would have been sub-

ject to in case he had been the owner of record of such proportionate part of the shares held by the Trustees in any corporation as the number of shares called for by his Trustees' Participation Certificate bears to the whole number of shares covered by all outstanding Trustees' Participation Certificates; and to such extent he shall indemnify and hold harmless the Trustees owning such stock from any loss or liability on account of being the holders or owners thereof. The measure of liability assumed hereunder shall be the same as that provided by law with reference to the holders of stock in any particular corporation in which the Trustees may hold stock as is provided by law with reference to the holders of such stock, and no more."

X.

At the time of the closing of the National Bank of Kentucky as aforesaid, there were issued and outstanding 570,550 shares of the trust estate having a par value of $10.00 per share, and said shares represented 39,820 shares of the capital stock of the National Bank of Kentucky having a par value of $100. per share.

XI.

On or about July 19, 1929 the officers and directors of the National Bank of Kentucky and the officers and directors of the Louisville Trust Company and the Trustees under the trust agreement of April 22, 1927, proposed to the holders of said Trustees Participation shares of the National Bank of Kentucky and the Louisville Trust Company, that the two banks and the business conducted by them should be reorganized by adding to this group a third corporation which said officers, directors and trustees represented would make the operations of these banking institutions more profitable, and ex-

pand their facilities for the profit of the shareholders of said banks. The plan of reorganization proposed by the officers and directors of the two banks and approved by formal resolutions of the trustees under the trust agreement of April 22, 1927 was to organize under the laws of the State of Delaware, a holding corporation to be known as the BancoKentucky Company, with an authorized capital of 2,000,000 shares having a par value of $10. each and to exchange the stock of this holding corporation for stock of the bank, represented by the Trustees Participation Certificates on the basis of two shares of the stock of said holding corporation, the BancoKentucky Company, for each Participation share.

The Trustees Participation shareholders were advised that it was an essential part of the plan that the shares of this holding corporation, the BancoKentucky Company (or at least a substantial majority thereof) be owned by the Trustees Participation shareholders and that it be managed and operated by the boards of directors and officers of the two banks. The holders of 570,550 shares of the trust estate approved and adopted the plan above described and the holders of 540,384 shares of the trust estate representing 37,714.6422 shares of stock of the National Bank of Kentucky exchanged their Trustees Participation Certificates which represented the stock of National Bank of Kentucky and the Louisville Trust Company, for 1,080,768 shares of the holding company, BancoKentucky, which shares continued thereafter to represent the holders' interest in said bank stock.

XII.

Pursuant to the above described plan, the holders of the Trustees Participation shares representing approximately 95% of the stock of the National Bank of Ken-

tucky and the Louisville Trust Company, caused said holding corporation to be organized as their agency and instrumentality, for their own use and enrichment and in furtherance of a scheme to engage in unlawful acts and to enable them through said corporate agency and instrumentality unlawfully to acquire, own, hold, control and operate a group of state and national banks and trust companies contrary to and in defiance of the meaning, spirit and intent of the laws of the United States and of the Commonwealth of Kentucky and other states relating to the ownership, operation and supervision of banks and trust companies.

Accordingly said holding corporation, the Banco Kentucky Company, was incorporated under the laws of the State of Delaware on July 16, 1929 with an authorized capital of 2,000,000 shares of common stock of the par value of $10. each for the alleged purposes set forth in its articles of incorporation as follows:

> "The acquiring by purchase or otherwise of all or any portion of the capital stock, property, assets and franchises of any or all corporations transacting business in any state of the United States; the purchasing, holding, selling, assigning, transferring, mortgaging, pledging or otherwise disposing of shares of the capital stock of or any bonds, securities or evidence of indebtedness created by or issued by any other corporation or corporations organized under the laws of any State of the United States or of any foreign country and while the owner thereof to exercise all the rights, powers and privileges of ownership the purchasing or otherwise acquiring of any promissory notes or other evidences of indebtedness executed by any person, firm, association or corporation; the financing, managing or operating of any commercial or manufacturing business or enterprise;

the underwriting of any issue of stocks, bonds, debentures or other securities issued by any corporation; the charging of fees or commissions for any or all services rendered or advice or assistance given to any person, firm, association or corporation; acquiring and paying for in cash, stock or bonds, of this corporation or otherwise, the good will, rights, assets and property of any person, firm, association or corporation and to undertake or assume the whole or any part of the obligations or liabilities of any person, firm or corporation.

"The corporation shall have power to act as registrar or transfer agent for any other association or corporation and to act as agent in general for any other person, firm, association or corporation.

"The corporation shall have full power to issue bonds, debentures or obligations of this corporation from time to time, for any of the objects or purposes of the corporation and to secure the same by mortgage, pledge, deed of trust or otherwise. The corporation shall have full power to purchase, hold, sell and transfer the shares of its own capital stock, provided it shall not use its funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of its capital; and provided, further, that shares of its own capital stock belonging to it shall not be voted upon directly or indirectly.

"The corporation shall have full power to guarantee the obligations of any other person, firm, association or corporation and to become surety therefor and to become joint maker, endorser or acceptor of any such obligations and to charge fees and commissions for such services.

"The corporation shall have full power without restriction or limit as to amount to purchase or otherwise acquire, hold, own, mortgage, sell, convey or otherwise dispose of real and personal property of every class and description in any of the States of

the United States, or any foreign country, subject to the laws of such States or foreign countries.

"In general, the corporation shall have full power to carry on any other business in connection with the foregoing whether commercial, manufacturing, financial or otherwise, and to have and exercise all the powers conferred by the laws of Delaware upon corporations formed under the act hereinafter referred to and to do any or all of the things hereinbefore set forth to the same extent as natural persons might or could do.

"The foregoing clauses shall be construed both as objects and powers, and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to that limit or restrict in any manner the powers of this corporation."

## XIII.

The defendants and other shareholders of said banks in carrying out the plan and scheme aforesaid through the agency and instrumentality of their holding corporation, the BancoKentucky Company, proceeded unlawfully to acquire, own, hold, control and operate a group of state and national banks and trust companies contrary to and in defiance of the meaning, spirit and intent of the laws of the United States and of the Commonwealth of Kentucky and of other states relating to the ownership, operation and supervision of banks and trust companies and unlawfully to use the assets of said banks and trust companies in speculative financial transactions prohibited by law, and unlawfully to use the assets and property of one or more of said banks in making loans on the security of the holding company stock in violation of law.

**XIV.**

After the aforesaid exchange of Trustees Participation Certificates for stock of the holding corporation, the BancoKentucky Company, the holders of the stock of the BancoKentucky Company continued to be the actual, real and beneficial holders of approximately 95% of the stock of the National Bank of Kentucky and continued after the organization of the holding company, to receive all of the benefits and advantages incident to the ownership of stock in said National Bank.

**XV.**

At the time of the organization of the BancoKentucky Company and at all times thereafter, the persons who appeared as stockholders of the said company exercised all the rights and privileges of shareholders of the National Bank of Kentucky and of the other banks and trust companies whose capital stock, was held by BancoKentucky. Said persons who appeared as stockholders of BancoKentucky secured and retained to their own use and enrichment all the benefits and advantages of shareholders of the National Bank of Kentucky and were from the time of the organization of the BancoKentucky Company up to the time of the closing of the National Bank of Kentucky the real, actual and beneficial owners of the Trustees Participation Certificates which represented shares of stock of the National Bank of Kentucky.

From the time of its organization to the date of the closing of the National Bank of Kentucky, the BancoKentucky Company acted as a corporate agency and instrumentality for the persons whose names appeared as stockholders of said company and as such corporate agency and instrumentality for said owners of the said Banco-

Kentucky Company stock it held the Trustees Participation Certificates which represented the shares of stock in the National Bank of Kentucky and the persons whose names appeared as stockholders of the BancoKentucky Company were the actual, real and beneficial owners of the stock of the National Bank of Kentucky.

## XVI.

The holders of the Trustees Participation Certificates who organized the BancoKentucky Company as a holding corporation for their bank stock, well knowing that said bank stock was subject to the individual liability of shareholders of national banks, imposed by the Acts of Congress, Sections 5151 and 5234 of the Revised Statutes of the United States and knowing that bank stock of state banking institutions was subject to individual liability imposed by state laws, nevertheless, in the organization of the said BancoKentucky Company, intentionally undertook to evade the provisions of said sections of the Acts of Congress by deliberately omitting from the Articles of Incorporation any provision for the payment of the liability upon national and state bank stocks provided by the laws of the United States, the Commonwealth of Kentucky and other states, and deliberately and intentionally sought to evade said liability by including the Articles of Incorporation of BancoKentucky Company the following language:

> "VIII. The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever."

and by printing in its certificates of stock the words "full paid and non-assessable," and in so attempting to evade

such assessment liability, perpetrated a fraud upon the depositors and creditors of the National Bank of Kentucky for whose benefit this action is brought.

## XVII.

By reason of all of the foregoing, the defendants are not entitled in equity and good conscience to the immunity recognized by law which stockholders of a bona fide lawfully formed and conducted corporation ordinarily have and defendants are not entitled in equity and good conscience to shield themselves from the assessment imposed upon them by law with said corporate form the Banco-Kentucky Company. By reason of the foregoing, the defendants are the real, true and beneficial shareholders of the National Bank of Kentucky and have promised to pay said assessment and are estopped to deny said assessment liability, and are the owners of shares of stock of the National Bank of Kentucky and each of the defendants appearing to be stockholders of the BancoKentucky Company is liable for the payment of the assessment levied by the Comptroller of the Currency hereinbefore referred to, individually, ratably and proportionately to the extent that the number of shares of stock held by him bears to the total number of shares issued and outstanding.

## XVIII.

Acting pursuant to the authority and direction of the Comptroller of the Currency, the Receiver of the National Bank of Kentucky, on or about March 20th, 1931, sent and served upon each of the defendants and all the other shareholders of the BancoKentucky Company, the following assessment notice:

"Office of the Receiver
THE NATIONAL BANK OF KENTUCKY
Louisville, Kentucky

Louisville, Ky., March 20, 1931

"As a stockholder in The BancoKentucky Company, you will please take notice, that the Comptroller of the Currency has on February 20, 1931, levied an assessment upon the stockholders of The National Bank of Kentucky, Louisville, Ky., on the par value of each and every share, *payable at the Office of the Receiver, on or before April 1, 1931.* A notice of such assessment and a demand for payment of the same has been served upon the Receiver of The BancoKentucky Company as the holder of 540,484 trustees' participation certificates, issued under a certain trust agreement of April 22, 1927, which trustees' participation certificates represent the ownership of 37,721.624 shares of stock in The National Bank of Kentucky. You will, therefore, take notice that it is the intention of the undersigned, as Receiver of The National Bank of Kentucky, to proceed against you for the collection of the aforesaid assessment liability represented by the said trustees' participation certificates held by said BancoKentucky Company, to the extent that the undersigned, as Receiver of the National Bank of Kentucky, is unable to collect said assessment from The BancoKentucky Company or its Receiver.

PAUL C. KEYES
RECEIVER OF
THE NATIONAL BANK OF KENTUCKY
Louisville, Kentucky

Registered Letter
Return Receipt Requested."

Enclosed therewith and attached thereto was a copy of the order of assessment upon shareholders made by the Comptroller of the Currency of the United States hereinabove described.

**XIX.**

Thereafter, the receiver of the National Bank of Kentucky secured leave of the Jefferson County Circuit Court, which had previously appointed a receiver for the Banco-Kentucky Company, to file an action against the receiver of the BancoKentucky Company to collect said assessment and leave having been secured, the receiver, on October 31, 1931, filed an action in this court against Joseph S. Laurent, Receiver of the BancoKentucky Company, praying for judgment by reason of the assessment in the amount of $3,772,162.40. Said cause being docketed in the United States District Court for the Western District of Kentucky as No. 1383. Thereafter, the cause was heard and on September 14, 1932, the Receiver of the National Bank of Kentucky recovered judgment for the full amount of the assessment, plus interest at the rate of six per cent (6%) per annum. Said judgment was entered September 14, 1932. Said judgment has been affirmed by the United States Circuit Court of Appeals and said judgment has become final and except for a credit of $90,745.17 hereafter described is wholly unpaid and unsatisfied.

**XX.**

On December 18th, 1934, the Receiver of the Banco-Kentucky Company paid to the plaintiff, as Receiver of the National Bank of Kentucky, the sum of $90,745.17, said payment being made to plaintiff as a creditor of BancoKentucky Company by reason of the judgment mentioned above and said payment is the only money paid to the plaintiff on account of the judgment for stock assessment up to the present time. The plaintiff says that there are other moneys which he may collect from the Receiver of the BancoKentucky Company, before the assets in the

hands of said Receiver are completely exhausted, but plaintiff says that there are numerous controversies with respect to the distribution of the assets of the Banco-Kentucky Company and says that for this reason he is unable to state at the present time what if any further sum may eventually be paid by the Receiver of the Banco-Kentucky Company on account of said judgment, but plaintiff alleges that BancoKentucky Company is hopelessly insolvent and any payment that might be made will be relatively small and that said judgment will remain substantially unsatisfied.

**XXI.**

Plaintiff says that the depositors and creditors of the National Bank of Kentucky have only been paid up to the present time, sixty-seven (67%) per cent of the face amount of their deposits and claims.

**XXII.**

Plaintiff further says that there is due him as Receiver of the National Bank of Kentucky by reason of the stock assessment on the 37,714.6422 shares of National Bank of Kentucky stock held by the BancoKentucky Company as the agency and instrumentality of the defendants and other shareholders of said company, and in accordance with their plan adopted as aforesaid, the sum of $3,771,-464.22, less $90,745.17 paid on December 18th, 1934.

**XXIII.**

On January 14th, 1930, the Articles of the BancoKentucky Company were amended and the authorized capital stock in said company was increased from 2,000,000 to 5,000,000 shares, each share having a par value of $10.00.

At the time of the closing of the National Bank of Kentucky, there were issued and outstanding 2,072,468 shares of the capital stock of the BancoKentucky Company.

## XXIV.

Each of the defendants and each stockholder of the BancoKentucky Company not named a defendant herein is individually liable to pay said assessment in the proportion that his shares of stock of the BancoKentucky Company bears to the total number of shares of the BancoKentucky Company issued and outstanding at the date of the closing of the National Bank of Kentucky. The plaintiff is informed and believes that the sum due from each stockholder of BancoKentucky Company, including interest to the date of the filing of this petition, amounts to approximately $2.304909 for each share of stock of the BancoKentucky Company registered in his name or owned by him at the time of the closing of the National Bank of Kentucky.

## XXV.

The several defendants named herein are holders or are personal representatives or distributees of estates of holders of BancoKentucky Company stock in the amounts set out opposite their respective names on the schedule and list hereto attached, made a part hereof, and marked "Exhibit A," and are each indebted to the plaintiff as Receiver of the National Bank of Kentucky in the estimated amounts set opposite their respective names on said Exhibit A, in the column thereof designated "Amount of Assessment," together with interest at the rate of six per cent (6%) per annum.

**XXVI.**

Plaintiff therefore prays:

1. That a subpoena be issued according to the course and practice of this court, requiring the defendants to appear and answer this Bill of Complaint, but not under oath, answer under oath being hereby expressly waived according to the rules and practice of this court.

2. That an accounting be made and stated to determine the number of shares of the stock of BancoKentucky Company that were issued and outstanding at the date of the failure of the National Bank of Kentucky; to determine the number of shares of the capital stock of the National Bank of Kentucky that were represented by the Trustees Participation Certificates held by the Banco-Kentucky Company as the agency and instrumentality of the defendants and the other stockholders of the Banco-Kentucky Company; to determine the proportionate part of a share of stock of the National Bank of Kentucky which was represented by a share of stock in BancoKentucky Company; to determine the proportionate amount of the assessment for which each holder of the stock of the BancoKentucky Company is liable giving due and proper credit to said defendants and the other stockholders of BancoKentucky Company for such part of the assessment that the Receiver has collected, or may hereafter collect, and for which said defendants and other shareholders are entitled to credit.

3. That the court fix and determine the number of shares of National Bank of Kentucky stock of which the several defendants, or their decedents or transferors, were the record and beneficial owners, and the assessment liability thereon, and that upon such accounting, the plaintiff be awarded a judgment and decree against the several

defendants for the amount, by said accounting found to be due from each of them.

4. That plaintiff may have such further, other and different relief in the premises to which he may be entitled and as shall be agreeable to equity and good conscience.

NICHOLS, MORRILL, WOOD, MARX & GINTER,
*Solicitors for Plaintiff.*

(Duly Verified)

**EXHIBIT "A"**

| NUMBER OF ITEM | NAME | NUMBER OF SHARES | AMOUNT OF ASSESSMENT |
|---|---|---|---|
| 85 | Helmers, Lawrence S. | 570 | $1313.79 |
| 120 | Levy, Lewis | 50 | 115.24 |
| 193 | Schwartz, Oscar | 870 | 2005.27 |
| 210 | Sterne, Alice | 480 | 1106.35 |

*Names of other defendants omitted*

## MOTION TO DISMISS OR TRANSFER

(Filed January 6, 1937)

Now come the defendants Lawrence S. Helmers, and Alice Sterne, and move the court for an Order to Dismiss the Bill of Complaint herein for each of the following reasons:

(a) The Bill of Complaint on its face does not make a case for equity jurisdiction.

(b) There is a misjoinder of parties defendant.

(c) There is a nonjoinder and absence of indispensable parties defendant.

(d) The jurisdictional amount as to certain of these defendants is lacking.

(e) There are no facts alleged sufficient to constitute a valid cause of action in equity.

(f) The Bill of Complaint shows on its face that the alleged action is barred by the statute of limitations and by laches.

If the foregoing motion to dismiss should be overruled, then these defendants move that this cause be transferred to the law side of this court under Equity Rule 22.

MURRAY SEASONGOOD,
ROBERT P. GOLDMAN,
JOSEPH A. SEGAL,
*Solicitors for Defendant.*

PAXTON & SEASONGOOD,
*Of Counsel.*

January 6, 1937

An identical motion was filed on behalf of the defendant, Oscar Schwartz, on January 25, 1937.

## MOTION TO DISMISS

(Filed January 6, 1937)

Now comes the defendants, Leo Mook, Mrs. Eugene Brunsman, C. Ralph Weil, Sidney Weil and Lewis Levy, and move the court to dismiss the Bill of Complaint filed herein for the following reasons and upon the following grounds:

1. That the Bill of Complaint is without equity and that this court is without jurisdiction to hear or decide the cause as a suit in equity.

2. That no ground of equitable jurisdiction is set forth in the Bill of Complaint and the complainant's remedy, if any, is at law.

3. That the Bill of Complaint alleges an insufficiency of facts to constitute a valid cause of action in equity.

4. That there is a misjoinder of parties defendant and causes of actions.

5. That the Bill shows upon its face that plaintiff has heretofore elected to prosecute his alleged cause of action against the BancoKentucky Company, and has prosecuted said action to a judgment, and has collected a portion of said judgment, and that he is bound by said election and is estopped from prosecuting this action against this defendant.

6. That the Bill shows upon its face that the action set forth therein is barred by the statutes of limitations of Ohio and Kentucky, respectively, to-wit, General Code of Ohio, Section No. 11234, and Section 2515 Kentucky Statutes.

GALVIN & TRACY & LEWIS LEVY,
*Attorneys for Defendants, Leo Mook, Mrs. Eugene Brunsman, C. Ralph Weil, Sidney Weil, and Lewis Levy.*

## MEMORANDUM AND DECISION

(Filed August 11, 1945)

NEVIN, District Judge:

On February 1, 1945, counsel for various defendants herein appeared before the court and presented their views by way of oral argument. Thereafter, a transcript of those proceedings and the arguments of counsel was made by the Court Reporter and on March 3, 1945, that transcript was filed with the Clerk of this court.

On pages 17-19, inclusive of the transcript, appears the following: "Mr. Seasongood: (of counsel for defendants) . . . The motion is to dismiss. There are a number of them. Our firm represents over 150 of the defendants. There are other counsel who represent other defendants and there are various grounds of motions to dismiss, as for instance persons who have died that no claim was presented to

their estate. Our thought was, without going into those matters, we might defer consideration of those several defenses, so far as we are concerned and argue today simply the general question that the action is barred by the statute of limitations, not waiving it at all, but we thought if we are right in the view that we take that it is barred, it is not necessary to go into these special defenses which exist for some of the defendants. The Court: That is entirely satisfactory to the court, if it is to counsel for the defendants. Mr. Seasongood: We would not wish to be considered as waiving those. In case it should be necessary, then they could be argued. The Court: Is that satisfactory to counsel for plaintiff, Judge Marx? Judge Marx: Yes. The Court: I think that is the wise course to pursue because then I will be able to concentrate on this one question and not be confused by other arguments at this time and it won't be necessary to consider them at this time. I understand that if your motion on the statute of limitations is well taken, as you say, we would not come to the other question. If we do, we can come to that at a later time to be agreed upon. Very well. There are quite a number of other counsel here. Is that arrangement satisfactory to all of the other counsel? Mr. Seasongood: It is satisfactory. The Court: Let the record show this arrangement suggested by Mr. Seasongood appears to be satisfactory to all counsel who are present now and who had their appearance noted."

The cause is now before the Court on the various motions to dismiss filed by and on behalf of certain defendants (as stated by Mr. Seasongood) on "the general question that the action is barred by the statute of limitations."

It has been recently held by the Court of Appeals of this (Sixth) Circuit that "the defense of the statute of limitations . . . is properly raised by motion." Archie W.

*Memorandum and Decision*

Berry et al. v. Chrysler Corporation (decided July 23, 1945), — Fed. (2d) —.

In addition to their oral arguments counsel for the respective parties have filed numerous and exhaustive briefs, citing many authorities in support of and contra the motions.

A detailed discussion of the views of counsel and the authorities cited would require an extended opinion which, in the view of the Court, would neither be justified nor serve any useful purpose, (with the transcript on file).

Upon a consideration of the motions, the briefs and arguments of counsel and the applicable law, the Court is of opinion and so finds that the respective motions to dismiss on the ground that the action is barred by the statute of limitations are each and all, not well taken, and that they should be, and they are, overruled.

As the defendants are so numerous, counsel for plaintiff should prepare entries overruling the various motions to dismiss on behalf of the respective defendants on the ground that the action is barred by the statute of limitations and submit same to counsel for the respective defendants for their approval as to form, the respective defendants having the right, of course, to reserve their exceptions to the substance of the order. Thereafter, the orders may be submitted to the Court for approval.

/s/ Robert R. Nevin,
*U. S. District Judge.*

APPEARANCES:

*For Plaintiff:*

Hon. Robert S. Marx and Harry Kasfir, Esq.

*For Defendants:*

Murray Seasongood, Esq., and Joseph A. Segal, Esq., of the firm of Paxton & Seasongood, for some of the defendants.

Ralph E. Clark, Esq., for several defendants.

Lawrence E. Eichel, Esq., and Jack B. Josselson, Esq., for some of the defendants.

Saul Zielonka, Esq., for I. L. and Sam J. Greenwald.

Clifford Ellig, Esq., of Lemkuhl & Ellig, for Ibold.

Johnson, Levy & Koodis ., Esqs., for the First National Bank and Albert N. Wolfstein.

Messrs. Galvin, Tracey, Geoghegan and Millikin for some of the defendants.

## STIPULATION AS TO FACTS

(Filed January 19, 1946)

It is hereby stipulated as follows:

1. The organization certificate of The National Bank of Kentucky states that the place where its operations of discount and deposit are to be carried on is the City of Louisville, Jefferson County, State of Kentucky.

2. The business of The National Bank of Kentucky was at all times actually carried on and transacted in Louisville, Jefferson County, Kentucky and in no other place.

*Exhibit 1*

3. Exhibit 1 attached hereto and made a part hereof is a true copy of the order issued by the Comptroller of the Currency referred to in paragraph VI of the Complaint.

4. Exhibit 2 attached hereto and made a part hereof is a true copy of the notice referred to in paragraph XVIII of the complaint.

It is further stipulated and agreed that the foregoing facts may be considered by the court on hearing of the various motions to dismiss with the same effect as if such facts were alleged in the complaint.

/s/ HARRY KASFIR,
NICHOLS, WOOD, MARX & GINTER,
*Attorneys for Plaintiff.*

PAXTON & SEASONGOOD,
*Attorneys for Charles W. Adler and 161 other Defendants.*

LEWIS LEVY,
*Pro Se.*

## EXHIBIT 1

## ASSESSMENT UPON SHAREHOLDERS

No. 5312

TREASURY DEPARTMENT

OFFICE OF THE COMPTROLLER OF THE CURRENCY

Washington, February 20, 1931

*In the matter of*
THE NATIONAL BANK OF KENTUCKY
OF
LOUISVILLE, KENTUCKY

*To all whom it may concern:*

WHEREAS, upon a proper accounting by the Receiver heretofore appointed to collect the assets of "The National

*Exhibit 1*

Bank of Kentucky of Louisville," Kentucky, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States, Section 1c 156, Act of June 30, 1876, and Section 23, Act approved December 23, 1913, known as Federal Reserve Act.

Now, THEREFORE, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said "The National Bank of Kentucky of Louisville," for Four Million ($4,000,000) dollars, to be paid by them on or before the first day of April 1931, and I hereby make demand upon each and every one of them for the par value of each and every share of the capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct Paul C. Keyes, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

IN WITNESS WHEREOF I have hereto set my hand and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this twentieth day of February, A. D. 1931.

(Signed) J. W. POLE,

[SEAL] *Comptroller of the Currency.*

*Exhibit 2*

**EXHIBIT 2**

OFFICE OF THE RECEIVER
THE NATIONAL BANK OF KENTUCKY
LOUISVILLE, KENTUCKY

Louisville, Ky., March 20, 1931

As a stockholder in The BancoKentucky Company, you will please take notice, that the Comptroller of the Currency has on February 20, 1931, levied an assessment upon the stockholders of The National Bank of Kentucky, Louisville, Ky., on the par value of each and every share, payable at the Office of the Receiver, on or before April 1, 1931. A notice of such assessment and a demand for payment of the same has been served upon the Receiver of The BancoKentucky Company as the holder of 540,484 trustees' participation certificates, issued under a certain trust agreement of April 22, 1927, which trustees' participation certificates represent the ownership of 37,721.624 shares of stock in The National Bank of Kentucky. You will, therefore, take notice that it is the intention of the undersigned, as Receiver of The National Bank of Kentucky, to proceed against you for the collection of the aforesaid assessment liability represented by the said trustees' participation certificates held by said BancoKentucky Company, to the extent that the undersigned, as Receiver of The National Bank of Kentucky, is unable to collect said assessment from The BancoKentucky Company or its Receiver.

(Signed) PAUL C. KEYES,
*Receiver of the National Bank of Kentucky*
Louisville, Kentucky

Registered Letter
Return Receipt Requested

## JUDGMENT ENTRY AGAINST DEFENDANTS LEWIS LEVY, LAWRENCE S. HELMERS, OSCAR SCHWARTZ AND ALICE STERNE

(Entered January 19, 1946)

This matter came on to be heard on the bill of complaint of A. M. Anderson, Receiver of National Bank of Kentucky, and on the motions to dismiss of the defendants Lewis Levy, Lawrence S. Helmers, Oscar Schwartz and Alice Sterne and on the stipulation as to facts to be considered by the court on the hearing of the motions to dismiss and on the briefs and arguments of counsel. On consideration of the record and the papers the court finds that the motions to dismiss of the defendants, Lewis Levy, Lawrence S. Helmers, Oscar Schwartz and Alice Sterne are not well taken and the same are hereby overruled. To which said defendants except.

The defendants Lewis Levy, Lawrence S. Helmers, Oscar Schwartz and Alice Sterne having declined to plead further, it is hereby ordered, adjudged and decreed that the plaintiff recover judgment against them.

Coming to enter judgment the court finds that in addition to the sum of $90,745.17 paid by the Receiver of BancoKentucky Company to the Receiver of National Bank of Kentucky, as set out in paragraph 20 of the bill of complaint, the sum of $716,150.22 has been paid by said Receiver of BancoKentucky Company to the Receiver of National Bank of Kentucky, of Louisville, to apply on the judgment obtained by the Receiver of National Bank of Kentucky, of Louisville, against the Receiver of Banco-Kentucky Company for assessment, which sum is an additional credit on said judgment.

The court finds that after allowing all of the credits there is due as of this date from each of the holders of

the stock of BancoKentucky Company the sum of $3.0458691 for each share of stock of said company held by them as of the time of the closing of National Bank of Kentucky, of Louisville. The court further finds that the defendant Lewis Levy was the holder of fifty shares of BancoKentucky stock; the defendant Lawrence S. Helmers was the holder of five hundred and seventy shares of BancoKentucky stock; that the defendant Oscar Schwartz was the holder of eight hundred and seventy shares of Banco stock, and the defendant Alice Sterne was the holder of four hundred and eighty shares of Banco stock. It is therefore ordered, adjudged and decreed that A. M. Anderson, Receiver of National Bank of Kentucky recover from Lewis Levy the sum of $152.50; from Lawrence S. Helmers the sum of $1,738.50; from Oscar Schwartz $2,653.50 and from Alice Sterne $1,464.00, together with interest on the respective amounts at the rate of 6% per annum from the date of this entry until said sums shall be paid.

It is further ordered, adjudged and decreed that said A. M. Anderson, Receiver of National Bank of Kentucky, recover from each defendant named above the marshal costs incurred as to each defendant and that said A. M. Anderson, as Receiver, further recover from each defendant listed above as costs an additional amount of 1½c for each share of BancoKentucky stock held by them, which costs are to be taxed by the Clerk, and for the abovementioned respective amounts and costs plaintiff may have execution against each of said respective defendants.

It is further ordered that this cause be continued as to the remaining defendants.

ROBERT R. NEVIN,
*U. S. District Judge.*

## NOTICE OF APPEAL

(Filed February 6, 1946)

Notice is hereby given that Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy, defendants herein, hereby appeal to The United States Circuit Court of Appeals for the Sixth Circuit from the final judgment against them entered in this action on January 19, 1946 in the District Court of the United States for the Southern District of Ohio (Western Division).

PAXTON AND SEASONGOOD,
*Of Counsel.*

MURRAY SEASONGOOD,
ROBERT P. GOLDMAN,
JOSEPH A. SEGAL,
*Attorneys for Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy.*

LEWIS LEVY,
*Pro Se.*

## BOND FOR COSTS OF APPEAL

KNOW ALL MEN BY THESE PRESENTS, That Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy, as principals, and The Hartford Accident and Indemnity Company, as surety, are held and firmly bound unto A. M. Anderson, Receiver of the National Bank of Kentucky, in the sum of Two hundred fifty ($250.00) dollars, to be paid to the said A. M. Anderson, Receiver as aforesaid, his successors and assigns, for the payment of which we bind ourselves, our executors, ad-

ministrators and assigns, jointly and severally, by these presents.

Sealed with our seal and dated this 6th day of February, 1946.

WHEREAS, lately at a regular term of the District Court of the United States for the Southern District of Ohio, Western Division, in a suit pending in said Court between A. M. Anderson, Receiver of the National Bank of Kentucky, plaintiff, and each of the defendants herein named and others, a judgment was rendered on the 19th day of January, 1946 against each of the defendants herein named, and each of said defendants having filed in said District Court a Notice of Appeal to the United States Circuit Court of Appeals for the Sixth Circuit to reverse said judgment:

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that, each of the said defendants herein named shall prosecute their said appeal to effect and pay the costs herein if the appeal is dismissed or the judgment affirmed, all such costs as the Appellant Court may award if the judgment is modified, then the above obligations shall be void; otherwise it shall remain in full force and effect.

LAWRENCE S. HELMERS, OSCAR SCHWARTZ, ALICE STERNE AND LEWIS LEVY

By JOSEPH A. SEGAL,

*Counsel.*

HARTFORD ACCIDENT & INDEMNITY COMPANY

By R. M. SCHILL,

*Attorney in Fact.*

(Power of Attorney Attached)

## STATEMENT OF POINTS TO BE RELIED UPON

(Filed February 8, 1946)

The defendants, Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy, who filed Notice of Appeal to the Circuit Court of Appeals for the Sixth Circuit from the judgment entered herein on January 19, 1946 in favor of plaintiff, rely upon each of the following points for reversal of said judgment:

1. The court erred in overruling the motions of said defendants to dismiss the Bill of Complaint, and in failing to dismiss said Bill of Complaint.

2. The court erred in not deciding that the cause of action alleged in the Bill of Complaint is barred by the Statute of Limitations.

3. The court erred in failing to decide that the cause of action alleged in the Bill of Complaint arose in the State of Kentucky (where the applicable period of limitations for an action such as this is five years after accrual) and that the alleged cause of action having been brought more than five years after its accrual was, therefore, barred by reason of Section 11234 of the General Code of Ohio which borrows the period of limitations provided for like causes of action by the laws of the state in which the cause of action arose.

4. The court erred in failing to decide that the cause of action arose in Kentucky in view of the fact that it appeared from the Bill of Complaint and the Stipulation that the National Bank of Kentucky was domiciled and transacted all its business in that state.

5. The court erred in failing to decide that the cause of action arose in the state of Kentucky in view of the further fact that it appeared from the Bill of Complaint and the Stipulation that the assessment sued upon was payable at Louisville, Kentucky.

6. The court erred in failing to decide that if the cause of action did not arise in the state of Kentucky, it arose in the District of Columbia where the applicable period of limitations for an action such as this is three years after its accrual, and that the alleged cause of action was, therefore, barred by reason of Section 11234 of the General Code of Ohio.

7. The court erred in rendering final judgment against said defendants.

PAXTON AND SEASONGOOD,
*Of Counsel.*

MURRAY SEASONGOOD,
ROBERT P. GOLDMAN,
JOSEPH A. SEGAL,
*Attorneys for Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy.*

LEWIS LEVY,
*Pro Se.*

## STIPULATION AS TO CONTENTS OF RECORD ON APPEAL

(Filed February 7, 1946)

It is hereby stipulated by and between plaintiff and the defendants, Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy, who filed a notice of appeal on February 6, 1946, that the following shall constitute and be included in the record on appeal to the Circuit Court of Appeals for the Sixth Circuit:

1. Bill of Complaint filed herein December 12, 1936, omitting from the title and Exhibit A thereof the names, addresses and other facts with reference to defendants other than those by whom the appeal is being taken.

*Stipulation as to Contents of Record on Appeal*

2. Motion to Dismiss or Transfer filed January 6, 1937 on behalf of the defendants, Lawrence S. Helmers and Alice Sterne, omitting therefrom the names of other defendants joining in such motion, together with a statement that an identical motion was filed on behalf of the defendant, Oscar Schwartz, on January 25, 1937.

3. Motion to Dismiss filed on behalf of the defendant, Lewis Levy, on January 6, 1937.

4. Memorandum and decision of Hon. Robert E. Nevin dated August 10, 1936.

5. Stipulation as to facts filed January 10, 1936.

6. Judgment Entry against defendants, Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy entered January 10, 1936.

7. Notice of Appeal with date of filing.

8. Undertaking on appeal and.

9. Statement

10. Bill

11. Stipulation providing for the transmittal of record in all cases taken from the Judgment Entry filed January 10, 1936.

12. Any extension or extensions of time for filing the record on appeal and docketing the action.

13. Stipulation as to certification of record.

[illegible],
Simon, Wise, Mack & Greve,
*Counsel for Plaintiff.*

Joseph A. [illegible],
Payne and Shafer,
*Counsel for Defendants, Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy.*

Lewis Levy,
*Pro Se.*

**STIPULATION PROVIDING FOR ONE TRANSCRIPT OF RECORD ON ALL APPEALS TAKEN FROM THE JUDGMENT ENTRY ENTERED JANUARY 19, 1946**

(Filed February 7, 1946)

It is hereby stipulated that all the appeals taken herein from the judgment entry filed January 19, 1946 may be prosecuted by one transcript of record prepared pursuant to a stipulation designating the contents of the record on appeal.

/s/ HARRY KASFIR,
NICHOLS, WOOD, MARX & GINTER,
*Counsel for Plaintiff.*

JOSEPH A. SEGAL,
PAXTON AND SEASONGOOD,
*Counsel for Defendants, Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy.*

LEWIS LEVY,
*Pro Se.*

**STIPULATION AS TO CERTIFICATION OF RECORD**

(Filed February 7, 1946)

It is hereby stipulated that the foregoing transcript of record was jointly prepared by counsel for plaintiff and by counsel for defendants, Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy, in whose behalf notice of appeal to the United States Circuit Court of Appeals for the Sixth Circuit was filed from the judgment entered herein on January 19, 1946, and that the Clerk of the United States District Court is hereby au-

thorized to treat the foregoing transcript of record as the record upon the Appeal and for certifying it accordingly.

/s/ HARRY KASFIR,
NICHOLS, WOOD, MARX & GINTER,
*Counsel for Plaintiff.*
JOSEPH A. SEGAL,
PAXTON AND SEASONGOOD,
*Counsel for Defendants, Lawrence S. Helmers, Oscar Schwartz, Alice Sterne and Lewis Levy.*
LEWIS LEVY,
*Pro Se.*

## CERTIFICATE OF CLERK

I, Harry F. Rabe, Clerk of the District Court of the United States for the District and Division aforesaid, do hereby certify that the foregoing pages numbered from 1 to ——, inclusive, contain a true and correct copy of the record and proceedings indicated in the stipulation found on page —, as the same appear of record and on file in the office of said Clerk in said Court in the above entitled cause.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Cincinnati, Ohio, the — day of February, 1946.

HARRY F. RABE, *Clerk.*

_____

*Deputy.*

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**RECORD OF PROCEEDINGS**

**IN THE**

# UNITED STATES CIRCUIT COURT OF APPEALS

**SIXTH CIRCUIT**

**CAUSE ARGUED AND SUBMITTED**

(April 15, 1946)

(Before: ALLEN, MARTIN and MILLER, Circuit Judges.)

This cause is argued by Murray Seasongood and Joseph A. Segal for Appellants, by Ralph E. Clark as amicus curiae, and Robert S. Marx for Appellee and is submitted to the court.

**JUDGMENT**

(Filed June 24, 1946)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for further proceedings consistent with the opinion of this Court this day filed.

**OPINION**

(Filed June 24, 1946)

**No. 10198**

**UNITED STATES CIRCUIT COURT OF APPEALS**
**SIXTH CIRCUIT**

---

LAWRENCE S. HELMERS, ET AL.,
*Defendants-Appellants,*
v.
A. M. ANDERSON, Receiver of the National Bank of Kentucky,
*Plaintiff-Appellee.*

APPEAL from the District Court of the United States, Southern District of Ohio, Western Division.

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Decided June 24, 1946.

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Before ALLEN, MARTIN and MILLER, Circuit Judges.

MILLER, Circuit Judge. This appeal presents the question whether appellee's action, seeking to collect a "double liability" assessment levied by the Comptroller of Currency upon the stockholders of The National Bank of Kentucky of Louisville, Kentucky, was barred by the Statute of Limitations. The District Court held that the action was not so barred and overruled appellants' motion to dismiss the Bill of Complaint.

The Bill of Complaint, filed on December 12, 1936, in the United States District Court for the Southern District of Ohio, states that The National Bank of Kentucky of Louisville, Kentucky, was closed by resolution of its board of directors on November 16, 1930; that on November 17,

1930, the Comptroller of the Currency of the United States, being satisfied that the bank was insolvent appointed Paul C. Keyes receiver, who thereupon duly qualified and took possession of the books, records and assets of the bank and continued in control as such receiver until December 15, 1932, at which time he was succeeded by the appellant-appellee, A. M. Anderson; that on February 20, 1931, the Comptroller of the Currency, by virtue of the authority vested in him by law, made an assessment and requisition upon the shareholders of the bank for $4,000,000 to be paid by them on or before the first day of April 1931, and directed the receiver "to take all necessary proceedings by suit or otherwise to enforce the individual liability of said shareholders"; that acting pursuant to the authority and direction of the Comptroller of the Currency the Receiver on March 20, 1931, sent by registered mail to the shareholders of BancoKentucky Company, a Delaware corporation which owned substantially all of the stock of The National Bank of Kentucky, the following assessment notice:

Louisville, Ky., March 20, 1931.

"As a stockholder in the BancoKentucky Company, you will please take notice, that the Comptroller of the Currency has on February 20, 1931, levied an assessment upon the stockholders of The National Bank of Kentucky, Louisville, Ky., on the par value of each and every share, payable at the office of the Receiver, on or before April 1, 1931. A notice of such assessment and a demand for payment of the same has been served upon the Receiver of The BancoKentucky Company as the holder of 540,484 trustees' participation certificates, issued under a certain trust agreement of April 22, 1927, which trustees' participation certificates represent the ownership of 37,721.624 shares of stock in The National Bank of Kentucky. You will, therefore, take notice that it is the intention of the undersigned, as Receiver of The National Bank of Kentucky,

to proceed against you for the collection of the aforesaid assessment liability represented by the said trustees' participation certificates held by said Banco-Kentucky Company, to the extent that the undersigned, as Receiver of The National Bank of Kentucky, is unable to collect said assessment from The BancoKentucky Company or its Receiver.

PAUL C. KEYES
*Receiver of The National Bank of Kentucky*
*Louisville, Kentucky;"*

that he enclosed and attached thereto a copy of the order of assessment made by the Comptroller; that on October 31, 1931, the Receiver filed an action against the Receiver of The BancoKentucky Company in the United States District Court for the Western District of Kentucky, praying judgment by reason of the assessment in the amount of $3,772,162.40 and on September 14, 1932, recovered judgment for the full amount of the assessment plus interest, which judgment was affirmed by the United States Circuit Court of Appeals and is wholly unpaid and satisfied except for a credit of $90,745.17; that the depositors and creditors of The National Bank of Kentucky had only been paid 67% of the face amount of their deposits and claims, and that there was due him as Receiver of The National Bank of Kentucky by reason of the stock assessment the unpaid balance of $3,680,719.05. The Bill of Complaint named as defendants some 300 stockholders of BancoKentucky Company who were residents of the State of Ohio. Thereafter certain defendants filed motions to dismiss by which they raised the defense of the Statute of Limitations. *Berry, et al.* v. *Chrysler Corporation,* 150 Fed. (2d) 1002, C. C. A. 6th.

Except for the defense of the Statute of Limitations, and other special defenses available to certain defendants, the issues i this case are the same as those involved in

*Anderson* v. *Abbott*, which was filed by the Receiver of The National Bank of Kentucky in the Western District of Kentucky against shareholders of BancoKentucky Company residing in Kentucky. 32 Fed. Supp. 328. Action in this case was suspended until that litigation, on the issues other than Statute of Limitations, could be finally disposed of by the Supreme Court of the United States. In that case the District Court rendered judgment for the defendants. The judgment was affirmed by the Court of Appeals for this Circuit. *Anderson* v. *Abbott*, 127 Fed. (2d) 696. On review, the Supreme Court of the United States held the defendants liable on the assessment and remanded the case to the District Court for appropriate action. *Anderson* v. *Abbott*, 321 U. S. 349; rehearing denied, 321 U. S. 804. Those opinions set out fully the relationship between The National Bank of Kentucky and BancoKentucky Company and the basis of liability, making it unnecessary to repeat it here. That ruling will control the decision in this case on its merits if the action is not barred by the Statute of Limitations. Thereafter the District Court overruled the motions, and by agreement of counsel and with the Court's consent the four appellants herein declined to plead further and final judgment for their proportionate share of the assessment was rendered against them to provide a test case. From this judgment the appeal is taken.

Although the suit was brought in equity the complaint seeks to enforce a legal right for which equity provides a concurrent remedy to avoid a multiplicity of suits. *Bailey* v. *Tillinghast*, 99 Fed. 801, C. C. A. 6th. In such a case the Federal Court sitting in equity will apply the applicable statute of limitations. *Russell* v. *Todd*, 309 U. S. 280. It is conceded by the parties herein that the Federal statutes provide no period of limitation for actions to enforce the liability of national bank stockholders, and accordingly the statute of limitations of the state in which

the action is brought is applicable. *Rawlings* v. *Ray*, 312 U. S. 96. It is also agreed that the complaint sets forth an action "upon a liability created by statute." 38 Stat. 273, § 64, Title 12 USCA. The General Statute of Limitations of Ohio provides that an action "upon a liability created by statute other than a forfeiture or penalty shall be brought within six years after the cause thereof accrued." G. C. § 11222. Ohio also has a special Statute of Limitations, generally known as the "Borrowing Statute" which reads—

> "If the laws of any State or country where the cause of action arose limits the time for the commencement of the action to a less number of years than do the statutes of this state in like causes of action, then said cause of action shall be barred in this state at the expiration of said lesser number of years." G. C. § 11234.

The Kentucky Statute of Limitations is also involved. Section 413.120 Kentucky Revised Statutes provides as follows:

> "An action upon a liability created by statute, when no other time is fixed by the statute creating the liability, . . . shall be commenced within 5 years next after the cause of action accrued."

Regardless of some early doubt in the matter, it is now settled that in an action by the receiver of an insolvent national bank to collect a Comptroller's assessment the statute of limitations does not begin to run until the day fixed by the Comptroller for payment. *Rawlings* v. *Ray*, supra; *Fisher* v. *Whiton*, 317 U. S. 217. In the present case, that date was April 1, 1931. The Bill of Complaint was filed on December 12, 1936. If the Ohio General Statute of Limitations is applicable the complaint was filed within the 6-year period provided. On the other hand, if the Ken-

tucky Statute of Limitations is applicable by reason of the Ohio Borrowing Statute above referred to on the ground that the cause of action arose in Kentucky, then the complaint was not fined within the 5-year limit provided by the Kentucky statute. This requires a ruling on the narrow question of "where the cause of action arose," as the words are used in the Ohio Borrowing Statute. Appellants contend that the five year Kentucky statute is applicable because the cause of action arose in Kentucky, where The National Bank of Kentucky was located and transacted business, where insolvency occurred, where the Receiver had his office and where the assessment was directed by the Receiver to be paid. They contend in the alternative that if the cause of action did not arise in Kentucky, it arose in the District of Columbia, where the applicable statute of limitations is 3 years. The appellee contends that the cause of action arose by virtue of a Federal statute and not by the law of Kentucky or any other state, that it arose in the United States, a country within the meaning of the terms contained in the Ohio Borrowing Statute, and not in the State of Kentucky or the District of Columbia, and that the laws of the United States, being the country where the cause of action arose, do not limit the time for the commencement of the action to a less number of years than do the statutes of Ohio, which necessarily means that the Ohio Borrowing Statute (making applicable the Kentucky Statute of Limitations or the District of Columbia Statute of Limitations) is not applicable.

A cause of action "is the fact or combination of facts which gives rise to a right of action, the existence of which affords a party a right to judicial interference in his behalf." *B. & O. R. R. Co.* v. *Larwill*, 83 O. S. 108, 115-116. See *Oman* v. *Delius*, 162 Tenn. 192, 199-200; *Maryland Casualty Co.* v. *Gerlaske*, 68 Fed. (2d) 497, 499 (C. C. A. 5th). The place where a cause of action arises is the place

where the operative facts that give rise to the action occur. Although it may be necessary that a number of separate facts exist in order to create a cause of action, yet it is the happening of the last of such facts which brings the cause of action into existence. Such an act, or the failure to act where there is a duty to do so, is the critical event which transforms a potential liability into one presently enforcible. See *Brown* v. *O'Keefe*, 300 U. S. 598, 603. A liability, whether created by contract or by statute, is not the same as a cause of action. A person may execute a note payable in the future. Such an obligation is a liability, but it does not become a cause of action until the note matures and the maker fails to pay. A business man may make a contract obligating him to manufacture and deliver certain goods at a time in the future. His obligation under that contract is a liability, but no cause of action exists against him until the date of performance arrives and he fails or refuses to perform. The income tax law imposes an obligation upon citizens to pay an income tax upon net income for the year previously ended. The amount of this tax is a liability, but no cause of action has accrued against the taxpayer until the date when the tax becomes payable and he has failed to pay. In the present case, a Federal statute created the potential liability of the defendant-stockholders, but the existence of this statute did not by itself create a cause of action against them. Nor did the existence of the statute coupled with the insolvency of The National Bank of Kentucky create a cause of action, although it formed the basis for one later to arise. Nor did the subsequent assessment by the Comptroller of the Currency, added to the existence of the statute and the insolvency of the bank create the cause of action, although it did change a potential liability into an actual one. Before the Receiver could rightfully sue the defendant-stockholders in this case, it was necessary that not only the foregoing facts exist but

in addition thereto the liability to pay the assessment must have matured by the passage of time to April 1, 1931, the date of payment specified in the assessment, and the defendants have failed to make payment on or before that time. It seems clear that if any stockholder had paid to the Receiver his portion of the assessment at any time during March 1931, no cause of action of the kind herein sought to be enforced would have at any time arisen or existed against him. The failure of the stockholder to pay on or before the date set for payment by the Comptroller is accordingly the critical event which transformed the liability into a cause of action. At that time and upon the happening of the last of those events the Statute of Limitations began to run. *Rawlings* v. *Ray,* supra; *Fisher* v. *Whiton,* supra. The time when a cause of action arises and the place where it arises are necessarily connected, since the same act is the critical event in each instance. The final act which transforms the liability into a cause of action necessarily has both aspects of time and place. It occurs at a certain time and in a certain geographical spot. Appellee apparently concedes the correctness of such reasoning by his reference in his brief to the opinion of Cleasby, one of the Judges of the Court of Exchequer in *Durham* v. *Spence,* the Law Reports Exchequer Cases, Vol. 6, 1870-1871, Page 52.

The question thus necessarily narrows itself into determining where the failure to pay the assessment ordered in the present case occurred. The notice which the Receiver sent to the defendant-stockholders on March 20, 1931, recited that the assessment was payable at the office of the Receiver, on or before April 1, 1931. Appellee points out that the preceding assessment by the Comptroller, on which the validity of the notice is based, did not designate the place of payment, and that the Receiver was in error in stating that the assessment so provided. That is correct.

However, the assessment directed "the Receiver, heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders." While the Receiver enforces the liability created by the assessment, he does so subject to the direction of the Comptroller. It is settled that the Comptroller in making the assessment has authority under the statute to fix a date for its payment, and to change an original date so fixed to a later date. *Rawlings* v. *Ray*, supra; *Fisher* v. *Whiton*, supra. Such authority is broad enough to include the designation of a place of payment as well as the time of payment, in the absence of any such contrary designation in the contract between the parties. When not so designated by the Comptroller, the Receiver had such authority under his direction by the Comptroller to take all necessary proceedings to enforce the assessment. It is stipulated in the case that the organization certificate of the National Bank of Kentucky provides that the place where its operations are to be carried on was Louisville, Kentucky, and that the business of The National Bank of Kentucky was at all times actually carried on and transacted in Louisville, Kentucky, and in no other place. The Receiver, accordingly, took over the books and assets of the insolvent bank and carried out the liquidation at that place. His office was in Louisville, Kentucky. He had no office in Ohio, nor do we see any real reason for requiring him to set up an office there or in the several other states where stockholders might reside. His designation of his office (in Louisville, Kentucky) as the place of payment was both logical and reasonable and within the authority conferred upon him. We believe it necessarily follows from the foregoing analysis of the facts that the cause of action herein sued on arose in Kentucky.

The same question was presented to the District Court of Pennsylvania in *Anderson* v. *Andrews*, 62 Fed. Supp. 705, where this same receiver brought suit against stockholders residing in Pennsylvania. It was there held under a similar Pennsylvania Borrowing Statute that the Statute of Limitations of Kentucky was applicable to and barred the cause of action set out in the complaint. Reference is made to the opinion in that case and to the authorities cited therein. The ruling is also supported by the following decisions from this Court in analogous situations; *B. & O. R. Co.* v. *Reed*, 223 Fed. 689, cert. denied, 239 U. S. 640; *Auglaize Box Board Co.* v. *Kansas City Fiber Box Co.*, 35 Fed. (2d) 822, cert. denied, 281 U. S. 730; *Hilliard* v. *Pennsylvania R. Co.*, 73 Fed. (2d) 473, cert. denied, 294 U. S. 721. Appellee attempts to distinguish the three cases from this Circuit by pointing out that two of them involved tort actions in which the accident occurred in states other than Ohio where the suit was brought, and that the third case involving a breach of contract occurring in a state other than Ohio where the suit was brought. He contends that in each of those cases the cause of action arose by reason of an illegal act on the part of the defendant and that the resulting liability was accordingly based upon fault, while in the present case he contends the liability exists by virtue of the Federal statute and without fault on the part of the defendants. The claimed distinction again fails to properly distinguish the difference between a liability and a cause of action. It is true that the liability in the present case exists without fault on the part of the defendants, but the cause of action came into existence by reason of the failure of the defendants to pay the assessment at the time and place provided. A failure to perform a legal duty at the time required is equivalent in the present case to an affirmative act. As previously pointed out, that fact occurred in Kentucky. We believe the decisions are closely in point.

We can not agree with appellee's contention that the cause of action arose in the United States and not in any state thereof. The distinction urged upon us by counsel seems highly theoretical and to disregard the fact that the United States as a geographical unit comprises the 48 separate states and the District of Columbia. If the critical act occurred within the geographical limits of the United States it necessarily occurred within the geographical limits of one of the 48 states or the District of Columbia. In this case the liability is created by a law of the United States, rather than by the law of Kentucky or of any other state, but the cause of action arose through a combination of that law and the failure to perform the duty imposed by that law. The failure to perform the required duty occurred in Kentucky, not in the United States generally without occurring in any of the subdivisions thereof.

The judgment of the District Court is reversed and the cause remanded for further proceedings consistent with the views expressed herein.

## PETITION FOR REHEARING

(Filed July 12, 1946)

Now comes A. M. Anderson, Receiver of the National Bank of Kentucky, appellee herein, and petitions this Court to grant a rehearing and in support thereof respectfully submits that the Court is in error in the opinion entered June 24, 1946, in its conclusion that appellee's cause of action arose in Kentucky.

The Court (Op. p. 5) defines cause of action as "the fact or combination of facts which gives rise to a right of action, the existence of which affords a party a right to judicial interference in his behalf." That definition is satisfactory with respect to a theoretical cause or right of action but in securing "judicial interference" a litigant must

present facts entitling him to relief, to a court having jurisdiction of the parties.

The Supreme Court in *Bradford* v. *Southern Railway*, 195 U. S. 243, 248, said: "Lord Coke defined the word 'action' to be 'a legal demand of one's right,' and cause of action comprises every fact a plaintiff is obliged to prove in order to obtain judgment, or, conversely, every fact the defendant would have the right to traverse. *Railway Co.* v. *Dixon*, 179 U. S. 131, 139." See also *Martin* v. *Norfolk & Western R. R. Co.*, 43 Fed. (2d) 293, 295.

There is nothing in appellee's bill of complaint, or any of the numerous motions and answers filed by appellants, concerning failure to pay at any time or place. That was not an essential fact in plaintiff's cause of action and was first brought into the case by way of argument and for the purpose of making analogous definitions of "cause of action" from contract and tort cases.

The opinion continues (p. 5) with a statement that a cause of action arises at the place where the operative facts occur and that it is the happening of the last of such facts which brings the cause of action into existence. "Such an act, or the failure to act where there is a duty to do so, is the critical event which transforms a potential liability into one presently enforcible." See *Brown* v. *O'Keefe*, 300 U. S. 598, 603." But in that case the court said:

> "Liquidation coupled with insolvency is the critical event which is capable of transforming a potential liability into one presently enforcible as soon as a qualified claimant appears upon the scene."

The qualified claimant is of course the receiver. The last "critical event" requisite to a "presently enforcible" right is a qualified claimant. Failure to respond is not a fact or a critical event with respect to a receiver's cause of action.

The opinion also states that a promissory note creates

a liability but does not become a cause of action until "the note matures and the maker fails to pay." The maker's failure to pay is not part of the holder's cause of action. Demand and nonpayment are not essential allegations of plaintiff's cause of action on a promissory note. *31 O. Jur., Payment, Sec. 174, p. 245; Worst* v. *Bank,* 11 O. App., 308, 313. A cause of action on a note accrues *when* maturity arrives, and *where* it is by its terms payable. If there be no agreed place for payment the cause of action arises *where* the contract was made.

The opinion (p. 6) enumerates the operative facts in the present case, omitting one very important one and including one presented wholly by way of argument. Those elements are said to be (1) Federal statute; (2) insolvency of the bank; (3) assessment; (4) the maturity of the assessment "by the passage of time to April 1, 1931; and (5) "the defendants have failed to make payment on or before that time."

No case can be found suggesting that a stockholder's failure to make payment at the end of the grace period allowed him by the Comptroller is a fact to be alleged and proven by the Receiver in carrying out his statutory duty to "enforce" shareholders liability, except the decision by the District Court of Pennsylvania in *Anderson* v. *Andrews,* 62 Fed. Supp. 705, which has been submitted to the Third Circuit Court of Appeals for decision in the Receiver's appeal.

The whole dispute in *Anderson* v. *Abbott* was the identification of holding company stockholders as owners of intangible personal property representing stock of the National Bank of Kentucky. Their liability attached upon their acquisition of the Delaware holding company's stock. Section 73 of the Delaware Corporation Law provides that the situs of that ownership "for all purposes," except taxation, was Delaware. For purposes of taxation its situs

was Ohio. 51 Am. Jur., Taxation, Secs. 496, 497. *Bouree v. Trust Francais,* 14 Del. Ch. 332, 127 A. 56. If we concede what appellants have so stoutly maintained, that their liability is based on a contract, then the analogy of the contract cases under conflict of laws is pertinent and contrary to this Court's opinion. When a person subjects himself to liability on a contract, not specifying a place for performance, the law of the place where it is made determines the obligation and the duty imposed on the obligator, and the cause of action arises there because the liability had its inception there. Appellants' "contract" was not made in Kentucky. They assumed their liability under the laws of the United States and, if there must be a place in the United States also within a state, where liability was contracted, that place was either Ohio or Delaware.

Having narrowed the issue to the determination of "where the failure to pay the assessment ordered in the present case occurred" the opinion (p. 6) answers that question solely by reference to the notice the Receiver sent the appellants on March 20, 1931. Conceding that the Receiver was not expressly authorized by the Comptroller's direction to enforce the assessment, to "designate" or to "fix" a place for payment, the opinion concludes that the Comptroller's authority was broad enough "to include the designation of a place of payment as well as the time of payment, in the absence of any such contrary designation in the contract between the parties." It was, of course, logical and reasonable for the Receiver to request payment at his office. But that is an entirely different matter from finding the Receiver empowered by law to "fix" or to "designate" a place for the performance of this "contract," without the assent of the other parties.

The Receiver was the statutory agent to enforce the stockholders' obligation to pay the assessment. No authority can be found and no logical reason is suggested for

the conclusion that the Receiver could, unilaterally, fix a place for performance of appellants' duty to pay. Surely asking for payment in Louisville would be as ineffectual in fixing a place for performance as it was in securing it from these stockholders.

Not only did the Receiver have no right to modify appellants' obligation in this regard, he did not even attempt to do so, as repeatedly decided by this Court. The notice referred to has been discussed by this Court in *Anderson* v. *Abbott*, 127 Fed. (2d) 696, 699, where it was said:

> "On March 20, 1931 the receiver of the national bank notified the stockholders of BancoKentucky Company that it was his intention to proceed against them for the collection of the assessment liability represented by trustees participation certificates held by the Banco-Kentucky Company to the extent that he should be unable to collect such assessment from the Banco-Kentucky Company or its receiver."

Again in *Abell* v. *Anderson*, 148 Fed. (2d) 372, this Court said:

> "In March, 1931, the Bank's receiver notified the shareholders of Banco that he had demanded payment of the assessment from Banco's receiver, and also that he intended to proceed against them to the extent that he was unable to collect from Banco."

That was substantially the language of the Supreme Court in *Anderson* v. *Abbott*, 321 U. S. 349, 354. The only purpose of that notice was to preserve appellee's rights against Banco shareholders while pursuing the holding company. See *Anderson* v. *Atkinson*, 22 Fed. Supp. 853, 855.

The opinion attributes to this notice an interpretation which it will not sustain, contrary to the Court's earlier interpretation and reaches a result for which there is no legal basis even though the present interpretation were correct.

Where a person has incurred a liability to pay money generally and there is no place agreed upon for performance, it is the debtor's duty to seek out the creditor but only when the parties are residents of the same state. Where, as here, the parties reside in different states, the creditor must go to the debtor. *Hale* v. *Patton*, 50 N. Y. 233, 48 C. J., Payment, pp. 592, 593; 40 Am. Jur., Payment, Sec. 17, p. 723, Sec. 18, p. 724.

Had the Receiver and the Comptroller purported to make demand upon appellants for payment of the assessment, in Kentucky, before it was due under the Comptroller's order, April 1, 1931, such demand would have been premature. In *Fisher* v. *Whiton*, 317 U. S. 217, it was held that, not only did the Receiver not have a complete and present cause of action until the date fixed by the Comptroller for the assessment's payment, but until that time he had no right to demand payment.

The period from the date the assessment was levied until it became payable was merely a grace period allowed by the Comptroller. *Strassburger* v. *Schram*, 93 Fed. (2d) 248, and *Reich* v. *Van Dyke*, 107 Fed. (2d) 682. Stockholders are not entitled to such a grace period as a matter of right. It is unnecessary that they even receive notice of assessment. *Brown* v. *Ellis*, 103 Fed. 834; *Rankin* v. *Miller*, 207 Fed. 602, 611. Only one fact occurred subsequent to the order of assessment which had any connection with plaintiff's cause of action, the arrival of April 1, 1931, which cannot be confined to Kentucky. See *Rawlings* v. *Ray*, 312 U. S. 96, 99, and the Court's comments on *Pufahl* v. *Estate of Parks*, 299 U. S. 217.

Aside from the fact that the three cases cited on page 8 of the opinion were suits for damages arising from wrongful acts, we wish to point out another distinction. In each of those cases the plaintiff had an opportunity of suing the wrongdoer in the state whose period of limitations was

borrowed and the inference is justified that the forum of suit was selected for the advantage of a longer period of limitations.

In this case appellants were never suable in Kentucky. They became potentially liable outside of Kentucky when they acquired Banco stock. That liability matured into a presently enforcible right upon the levying of the assessment and the arrival of April 1, 1931. Appellants' cause of action and right of action were complete on that date. Appellee then became entitled to "judicial interference in his behalf." He could not secure judicial interference in Kentucky but was compelled to seek it in Ohio. Judicial interference is an empty thing if there is no court available to enforce it.

> "From practical considerations, it has been held that a cause of action does not arise at a place where, because of the defendant's absence, no right could be enforced, and hence the statute admitting the bar of the place where the action arose applies the bar of a defendant's residence. . . ."
>
> "All of the foregoing principles are subject to the indispensable preliminary factor that a statute admitting the bar of another state should not be held to supply a defense if in fact the courts of such other state have not been in a position to afford relief." 11 Am. Jur., Conflict of Laws, Sec. 197.

The opinion concedes that appellants' liability exists without fault (p. 8) but states that the "cause of action came into existence by reason of the failure of the defendants to pay the assessment at the time and place provided. A failure to perform a legal duty at the time required is equivalent in the present case to an affirmative act. As previously pointed out, that fact occurred in Kentucky."

We do not believe that, in describing a stockholder's obligation to respond to an assessment as liability with

out fault, the Supreme Court in *Anderson* v. *Abbott* was discussing an immature potential liability as distinguished from a cause of action. The Supreme Court was discussing the liability of BancoKentucky stockholders in a suit to enforce payment of the assessment and not their status before the bank failed.

It is difficult to understand how the failure to perform a legal duty at the time required can be the equivalent of an affirmative act of wrongdoing in the sense of "*place where.*" Appellants simply failed and neglected to pay. They never agreed to pay any place. In fact, they relied on their stock certificates as a negation of any obligation to pay. An affirmative act has location. An absence of action has none. Both may permit a suit but an omission of a duty has no location where none is agreed upon.

We believe the Court to be in error in its statement that, had a stockholder paid the Receiver prior to April 1, 1931 (p. 6), no cause of action of the kind herein sought to be enforced would have at any time arisen or existed against him. If that be true a necessary allegation in plaintiff's suit to state a cause of action would be that the defendants had failed to pay. The fact of payment must be affirmatively pleaded at common law and under the pleading codes it has generally been held that evidence of payment may not be offered unless specially pleaded, even in cases where a plaintiff has alleged nonpayment. Ann. 100 A. L. R. 264. *Kalloch* v. *Hoagland*, 239 Fed. 252 (C. C. A. 6, 1917). Rule VIII of the Federal rules is to the same effect, requiring a defendant to affirmatively plead the defense of the statute of limitations, payment, etc. Since payment is purely defensive, failure to pay cannot be part of a plaintiff's cause of action.

The effect of this decision, that appellants' failure to pay was a critical event and the last operative fact essential to appellee's cause of action, is to hold that his failure

to negative a nonexistent defense resulted in his not presenting a cause of action.

We submit that there is nothing highly theoretical about appellee's contention that the cause of action arose in the "country," the laws of which provide no period of limitations to be borrowed under the Ohio statute. Plaintiff's cause of action and right of action involved only two ultimate facts, namely, appellants' ownership of property subjecting them to liability and the necessity of enforcing that liability to pay depositors. The assessment itself was a quasi judicial determination by the Comptroller. The only traversable fact was appellants' status as shareholders under the National Bank Act. The law of the country, plus that status, presented an actionable right. The actionable quality or nature of acts resulting in tort or contract liability are determined with reference to the *lex* loci, the local *law*. It is the *law* that governs and in this case it is the law of the United States, not that of Kentucky, which governs appellee's cause of action.

It is respectfully petitioned that a rehearing be granted.

Respectfully submitted,

ROBERT S. MARX,
FRANK E. WOOD,
WILLIAM C. KELLY,
HARRY KASPIR,
*Attorneys for Appellee.*

## ORDER DENYING REHEARING

(Filed August 19, 1946)

Appellee's Petition for Rehearing having been considered by the Court,

IT IS ORDERED that the same be and is now overruled.

## CERTIFICATE OF COUNSEL

I, Frank E. Wood, of counsel for the above named A. M. Anderson, Receiver of National Bank of Kentucky, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

FRANK E. WOOD,

*Of Counsel for Receiver, A. M. Anderson.*

## CLERK'S CERTIFICATE

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *Lawrence S. Helmers, et al.* v. *A. M. Anderson*, Receiver, No. 10,198, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed by name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 22nd day of October, A. D. 1946.

(s) J. W. MENZIES,

*Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.*

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SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 656

ORDER ALLOWING CERTIORARI—Filed December 9, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 593.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

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FILED
OCT 28 1946
CHARLES ELMORE CROPLEY

No. 654

IN THE

# Supreme Court of the United States

October Term 1946

A. M. ANDERSON, Receiver of the National Bank of Kentucky, Louisville, Kentucky,

*Petitioner,*

v.

LAWRENCE S. HELMERS, LEWIS LEVI, OSCAR SCHWARTZ, ALICE STERNE,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF FOR PETITIONER

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No. _____

IN THE

# Supreme Court of the United States

October Term 1946

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*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF FOR PETITIONER

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To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, A. M. Anderson, Receiver of the National Bank of Kentucky, upon the direction of the Comptroller of the Currency of the United States, respectfully prays that a writ of certiorari be granted to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered June 24, 1946. Rehearing was denied petitioner August 19, 1946.

## JUDGMENTS BELOW

The District Court for the Southern District of Ohio overruled the motion of respondents to dismiss the complaint (R. 23, 30).[1] The opinion of the Sixth Circuit Court of Appeals reversed the District Court and ordered the complaint dismissed on the ground that the cause of action was barred by the Statute of Limitations (R. 2); 156 F. (2d) 47. The decision and judgment of the Circuit Court of Appeals for the Sixth Circuit was entered June 24, 1946. A petition for rehearing was timely filed and was denied on August 19, 1946.

The opinion of the Circuit Court of Appeals for the Sixth Circuit is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit on the same matter which is now pending before this court on petition for writ of certiorari, in the cause entitled *Francis R. Cope, Jr., Petitioner* v. *A. M. Anderson, Receiver of the National Bank of Kentucky, Respondent*, No. 593, October Term 1946.

## JURISDICTION

The jurisdiction of this court to review this cause by writ of certiorari is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

## THE QUESTION PRESENTED

The cause of action alleged seeks to impose liability for a national bank stock assessment upon shareholders of a bank stock holding company organized under the laws of Delaware.[2] The action was brought in the Southern District of Ohio well within the six-year period provided by the general laws of Ohio for the bringing of such actions. However, the action was brought after the expiration of the

[1] Not reported.
[2] *Anderson* v. *Abbott*, 321 U. S. 349.

five-year period of limitations provided by the laws of Kentucky for similar actions brought in that state.

The only question is whether the general law of Ohio, which permits suits to be brought within six years upon federally created causes of action where the federal law contains no limitation, shall be applied, or whether the Kentucky law barring actions in Kentucky on liabilities created by statute within five years, shall be *borrowed* under an exception to the general Ohio statute which provides that "if the laws of any state or country where the cause of action arose limit the time for the commencement of an action to a less number of years than do the statutes of this state in like causes of action, then said cause of action shall be barred in this state at the expiration of said lesser number of years."[1]

The District Court for the Southern District of Ohio held that the cause of action was to recover a liability imposed by the National Bank Act and therefore was timely brought. The Court of Appeals for the Sixth Circuit held that the cause of action arose in the State of Kentucky and was therefore barred. Petitioner contends that the cause of action is a federally created right arising under the laws of the United States and that the liability sought to be recovered is imposed by federal laws upon the shareholders of banks wherever they reside and in every state of the union and is not a cause of action which arose in Kentucky. No other question is involved.

## STATUTES INVOLVED

The cause of action is to recover a liability imposed and created by the National Bank Act, 12 U. S. C., Sections 63 and 64, Appendix p. 1. The Petitioner, as Receiver of an insolvent national bank, is mandated by federal law to

[1] Ohio General Code, Sec. 11234.

enforce the personal liability of shareholders under 12 U. S. C., Sections 191 and 192, Appendix p. 2. 12 U. S. C., Section 192, directs the Receiver to "pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller and also make report to the Comptroller of all his acts and proceedings." The Ohio Statute of Limitations, which is applicable to statutory liabilities, including the recovery of liabilities created by federal statutes where no federal statute of limitation exists, is six years after the cause thereof accrues. *Ohio General Code,* Sec. 11222, Appendix p. 3. The exception to the general statute, sometimes referred to as the Ohio Borrowing Statute, upon which the Respondents rely, is *Ohio General Code,* Section 11234, Appendix p. 3. The Kentucky Statute of Limitations which Respondents seek to borrow provides for a five-year period for actions in that state upon liabilities created by statute. *Kentucky Revised Statutes,* Section 2515, now Section 413.120, Appendix p. 3.

## SUMMARY STATEMENT

The Petitioner as Receiver of the National Bank of Kentucky was required to resort to a court of equity to unravel the complications and pierce the corporate veil which surrounded the true, real and beneficial ownership of the bank stock. The story is told in detail in the opinion of this court in *Anderson* v. *Abbott,* 321 U. S. 349, and we therefore deem it unnecessary to do more than briefly note these facts. Practically all of the National Bank stock was registered in the names of six trustees under a lengthy trust indenture (R. 5). The trustees in turn issued so-called Trustees Participation Certificates (R. 6). Approximately ninety-five per cent of these Trustees Participation Certificates representing National Bank stock were exchanged for shares of stock of a Delaware corporation known as the

BancoKentucky Company, hereinafter referred to for brevity as "Banco" (R. 9). Banco was organized under the ordinary corporation laws of Delaware with omnibus powers. It was, in fact, a holding corporation which not only held the trust certificates representing the stock of the National Bank of Kentucky but also held stock in various other national and state banks located in both Ohio and Kentucky. In addition, Banco had a small number of shares of stock in an Ohio insurance company and debentures of a New Jersey rubber company.[4]

Petitioner brought this suit to recover from a large group of Ohio shareholders of Banco their proportionate part of the uncollected assessment on the bank shares represented by the Trust Certificates held by Banco. The Receiver had previously brought suit against the Banco corporation itself and recovered judgment, *Laurent* v. *Anderson*, 70 Fed. (2d) 819. Before bringing the suit against the corporation and its Receiver, petitioner sent a warning notice to the shareholders advising them of his intention to proceed, first, against Banco, that if he was unable to collect the assessment from Banco he would endeavor to collect the deficiency from its shareholders. The Receiver was only able to collect a small part of the assessment from the Receiver of Banco and brought actions in numerous states against shareholders residing therein to recover the deficiency, after giving credit to the defendants for collections made on the judgment against Banco (R. 17). The present suit was filed against Ohio shareholders on December 12, 1936, which was more than five but less than six years after the assessment became due.

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[4] *Atherton* v. *Anderson*, 86 Fed. (2d) 518, 99 Fed. (2d) 983, and also *BancoKentucky Company's Receiver* v. *National Bank of Kentucky's Receiver*, 281 Ky. 784, 137 S. W. (2d) 357.

## REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The decision of the Sixth Circuit Court of Appeals is in direct conflict with the decision of the Third Circuit Court of Appeals in a similar suit brought by the Petitioner against a large number of shareholders of Banco residing in Pennsylvania. Petition for writ of certiorari to review the decision of the Third Circuit Court of Appeals is now pending before this court in the cause entitled *Francis R. Cope, Jr., Petitioner* v. *A. M. Anderson, Receiver of the National Bank of Kentucky, Respondent,* No. 593, October Term 1946.[1] In the opinion of the United States Circuit Court of Appeals for the Third Circuit, Judge Goodrich states:

> "In reaching this conclusion we are quite conscious that we are in disagreement with our brethren in the Sixth Circuit in the decision they reached in *Helmers* v. *A. M. Anderson,* Fed. (2d) (C. C. A. 6, 1946), a case decided since the submission of the one at bar. We have read the carefully prepared opinion in that case, but are still constrained to follow the view of the matter which we have expressed above."

Petitioner believes that this cause falls squarely within the letter and spirit of Rule 5(b) indicating that the court will consider as a valid reason for granting review on certiorari the fact that "a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter."

2. We also believe that the question involved is an important question of federal law which should be finally

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[1] A large number of shareholders are defendants in both the Pennsylvania and the Ohio actions but in order to condense the record and save costs counsel have agreed that since the question involved is identical in all cases it may be presented in the case of a single shareholder in Pennsylvania and in the cases of four shareholders in Ohio, and that all other defendants in said actions will be bound by the decisions in the present cases.

settled by this court and that the Sixth Circuit Court of Appeals has decided a federal question in a way probably in conflict with the applicable decisions of this court. The question of liability for stock assessments and the applicable statute of limitations is important.*

The decision of the Sixth Circuit holding that the cause of action was contractual in character and that failure to pay at the office of the Receiver at Louisville was, in effect, a breach of contract in Kentucky, is contrary to this court's interpretation of the Receiver's notice to shareholders. *Anderson* v. *Abbott*, 321 U. S. 349, at page 354. It is also contrary to the decisions of this court which hold that Respondents' liability is statutory, not contractual and not bottomed on fault. *Anderson* v. *Abbott*, at pages 356 and 366; *McClaine* v. *Rankin*, 197 U. S. 154, at page 162. Under the applicable decisions of this court, the Sixth Circuit Court of Appeals erred in holding that the cause of action arose in Kentucky and in applying the law of limitations applicable to a state created right. See *Holmberg* v. *Armbrecht*, 327 U. S. 392.

Wherefore, your petitioner prays that this petition be granted and that a writ of certiorari issue to review this cause and the judgment of the Circuit Court of Appeals for the Sixth Circuit, entered June 24, 1946.

ROBERT S. MARX,
FRANK E. WOOD,
WM. C. KELLY,
HARRY KASFIR,
*Counsel for Petitioner.*

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* A number of national banks have not availed themselves of the privilege of terminating assessment liability of their shareholders under the permissive provisions of Section 64(a) of the National Bank Act. Certiorari was granted in *Fisher* v. *Whiton*, 317 U. S. 217, 219, because of the importance of the question of applicability of federal statutes of limitation to assessment claims in the administration of insolvent national banks, as well as because of conflict between decisions of Circuit Courts of Appeals.

## BRIEF

The opinions below, statement of jurisdiction, the questions involved and a summary statement of the case are contained in the petition for writ of certiorari.

## ARGUMENT

We respectfully submit that the reasons relied on for the allowance of the writ show the importance of the question involved and the necessity for review thereof by this court in order to resolve the conflict which has arisen between the Third Circuit Court of Appeals and the Sixth Circuit Court of Appeals on the same matter. The same stock assessment is involved in both cases; the same liability is asserted and is alleged to have arisen in the same way. In fact, the cases are identical with the cases against shareholders residing in the Western District of Kentucky, which were determined by this court in *Anderson* v. *Abbott*, supra. As this court has previously been advised, the actions against shareholders residing in other districts and in other states were stayed pending the decision of this court in *Anderson* v. *Abbott*. It so happens that the so-called Borrowing Act of Ohio and the so-called Borrowing Act of Pennsylvania are similar and in both the suit against Ohio shareholders and in the suit against Pennsylvania shareholders the defendants sought to borrow the same Kentucky statute. Hence, the questions to be determined are similar and should the petition for certiorari in this cause and in the case arising from Pennsylvania (*Cope* v. *Anderson*) be granted the causes can be argued and briefed together. If certiorari be denied an obvious injustice would necessarily result. It would not be in the interest of the orderly administration of justice to permit the Receiver to recover against the Pennsylvania shareholders and to deny him the right to recover against the Ohio shareholders, or vice versa.

In addition to the conflict between the decisions of two Circuit Courts of Appeal on the same matter, we respectfully urge that the Sixth Circuit Court of Appeals has decided an important question of federal law contrary to the applicable decisions of this court and that this question should be finally determined by this court. We believe it clear that this court has held that the liability for stock assessment imposed by the National Bank Act is statutory in character. *Anderson* v. *Abbott*, 321 U. S. 349, 366; *McClaine* v. *Rankin*, 197 U. S. 154, 162. Further, this court has indicated that statutes of limitation applicable to state created rights are not applicable as a bar to federally created rights. *Holmberg* v. *Armbrecht*, 327 U. S. 392. We do not believe it appropriate at the present posture of the case to brief the merits of the question presented. The excellent opinion of the Third Circuit Court of Appeals clearly demonstrates the erroneous conclusion reached by the Sixth Circuit Court in this cause. It would seem self-evident that within their constitutional sphere the laws of the United States impose stock assessment liabilities upon shareholders in every state in the union, which may be enforced wherever the shareholder resides and that such cause of action is not created by or limited by the laws of any one state. Where Congress has not seen fit to impose any federal limitation it must be presumed to have intended that the limitation of the forum where suit is brought shall be applied. The Respondents in the present case were residents of Ohio, when the assessment was levied and when it was payable. They never resided in Kentucky. They default and their resistance to payment occurred in Ohio where they lived; not in Kentucky where they were total strangers. They were not stockholders in a Kentucky corporation nor in a Kentucky bank. They were shareholders of a Delaware corporation, the Banco-Kentucky Company, which was not even admitted to do

business in the State of Kentucky. It is anomalous to say that the cause of action arose in Kentucky where defendants have never been and where no action against them could be brought and that a cause of action arose in a state where there was no right of action against Respondents.

We therefore respectfully submit that the cause of action in this case arose under the laws of the United States and not under the laws of Kentucky and that the petition for a writ of certiorari should be granted.

ROBERT S. MARX,
FRANK E. WOOD,
WM. C. KELLY,
HARRY KASFIR,
*Counsel for Petitioner.*

# APPENDIX

## U. S. C. Title 12

§ 63. Individual liability of shareholders.

The shareholders of every national banking association shall be held individually responsible, equally and ratably and *not one for another*, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; . . .

## U. S. C. Title 12

§ 64. Same; transfer of shares.

The stockholders of every national banking association shall be held individually responsible for all contracts, debts and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. Dec. 23, 1913, c. 6, § 23, 38 Stat. 273.

**U. S. C. Title 12**

§ 191. General grounds for appointment of receiver.

Whenever . . . or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 192 of this title. June 30, 1876, c. 156, § 1, 19 Stat. 63.

**U. S. C. Title 12**

§ 192. Default in payment of circulating notes.

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all moneys so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

**Ohio General Code**

§ 11222. *Contract not in writing.* An action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forefeiture or penalty, shall be brought within six years after the cause thereof accrued.

**Ohio General Code**

§ 11234. *Action, time for bringing.* If the laws of any state or country where the cause of action arose limits the time for the commencement of the action to a less number of years than do the statutes of this state in like causes of action then said cause of action shall be barred in this state at the expiration of said lesser number of years.

**Kentucky Revised Statutes**

§ 413.120 (2515; 2518). *Actions to be brought within five years.*

The following actions shall be commenced within five years after the cause of action accrued:

. . . .

(2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability.

. . . .

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No. 656

# Supreme Court of the United States

October Term, 1946

A. M. ANDERSON, Receiver of the National Bank of Kentucky, Louisville, Kentucky,

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v.

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*Respondents.*

## PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This Court has for consideration two petitions for certiorari, in two actions by the same receiver of the same national bank on the same stock assessment. In each the action is against shareholders of BancoKentucky Company. In each case, the same question is involved. The only difference is that in one case the defendants resided in Pennsylvania, were sued in the District Court there and were held liable.* Their prayer for certiorari is *Cope* v. *Anderson #593.* In the other case, the defendants resided in Ohio, the petition against them was dismissed and the Receiver asks for certiorari. *Anderson* v. *Helmers #656.*

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* *Anderson* v. *Andrews*, 62 F. Supp. 705, 156 F. (2d) 973.

The Receiver, in response to the *Cope* petition, has admitted that a conflict exists. He feels that all shareholders presenting similar defenses should be treated alike. The respondents in the *Helmers* case oppose certiorari. Their brief which contends there is no conflict between the Circuits and that the questions are dissimilar is pure *casuistry*. When it was to their interest they contended strenuously that the two cases were identical and the decisions were in direct conflict. In their brief, filed with the Court of Appeals for the Sixth Circuit (page 14), they stated:

> "*The decision of the District Court in the instant case is in direct conflict with the Andrews case.*" (Italics supplied.)

The admitted conflict between the District Courts continued when the disagreement was transferred to the two Appellate Courts. That there was a conflict was recognized by both Appellate Courts. The Third Circuit stated [156 Fed. (2d) 972, 975]:

> "In reaching this conclusion, we are quite conscious that we are in disagreement with our brethren of the Sixth Circuit in the decisions they reach in *Helmers* v. *Anderson*. . . ."

The Sixth Circuit handed down its opinion before the ruling in the Third Circuit. At that time the only opinion in the Pennsylvania case was a decision in the District Court. The Sixth Circuit stated [156 F. (2d) 47, 52]:

> "*The same question* was presented to the District Court of Pennsylvania in *Anderson* v. *Andrews*, 62 F. Supp. 705, where the same Receiver brought suit against stockholders residing in Pennsylvania. It was there held under a *similar* Pennsylvania borrowing statute. . . ."

Respondents contend that if any conflict exists, it is merely a conflict as to state law. This is incorrect. The borrowing act of Ohio only comes into play "if the laws of any state *or country* where the cause of action arose . . ." limits the time for commencement of the action to a less number of years than the statutes of Ohio. Similarly, the borrowing act of Pennsylvania only applies when a cause of action has been barred "by the laws of the state *or country* in which it arose." Both acts make a distinction between "state" and "country." No interpretation of the statutes of either state is involved. The question in both cases is "Where does the cause of action arise?" This is the source of the conflict between the two decisions.

The argument that the question—where the cause of action arose—is a matter of state law, would seem to be adequately characterized by the following language of this Court in *Seabury* v. *Green*, 294 U. S. 165, 168:

> "Respondent maintains that no federal question is involved. To the extent the opinion implies that liability of stockholders of national banks is a creature of or depends upon a statute of South Carolina, the assumption is so plainly without foundation as *to suggest that it must have been inadvertently made.*" (Emphasis added.)

The Circuit Court of Appeals for the Third Circuit held that this was a federal assessment arising under federal law. It is not "a state created right, but one created by United States statute" [156 F. (2d) 975]. The Court held that the cause of action arose in the United States which is a "country." It concluded: "This is not the kind of cause of action which is properly described as arising within the state of Kentucky" [156 F. (2d) 975].

On the other hand, the Sixth Circuit Court of Appeals pointed out that the problem presented was a ruling on the

narrow question of "where the cause of action arose?" and it concluded, "that the cause of action herein sued on arose in Kentucky."

This is not a conflict with respect to state law. It is a conflict on an important matter of Federal law. Certiorari was granted in *Rawlings* v. *Ray*, 312 U. S. 96, and in *Fisher* v. *Whiton*, 317 U. S. 217, because of a conflict in decisions as to "*when*" a cause of action for federal bank stock assessment arose. A supplementary ground of certiorari was "the importance of the question in the administration of insolvent national banks" [317 U. S. 219]. Of equal importance is the question—"*where*" does the cause of action arise? Both the *Rawlings* case and the *Fisher* case were admitted after a change in banking laws reduced the number of banks whose stockholders were subject to assessment [217 U. S. 219], yet the importance of the problem was still deemed to exist.

In an effort to create a difference between the two cases, respondents point to the stipulation present here, but not in the Pennsylvania case, to the effect that the business of the bank was carried on and transacted in Kentucky. The stipulation merely incorporated the law that a national bank cannot transact business outside of the state named in its charter as the place where it should do business. Branch banking beyond those limits is forbidden. This does not mean that the National Bank of Kentucky was confined to the state of Kentucky in the scope of its activities. As evidenced by these two cases, its shareholders reside throughout the United States. It made loans to corporations doing business in other states and it owned real estate in Louisiana. The stipulation was present in the record before the Sixth Circuit Court of Appeals when respondents argued that the lower court decisions were in conflict.

It is respectfully submitted that petitions for certiorari in both the *Cope* case and the instant case should be granted.

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## BRIEF FOR PETITIONER

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October Term, 1946

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A. M. ANDERSON, Receiver of the National Bank of Kentucky, Louisville, Kentucky,

*Petitioner,*

v.

LAWRENCE S. HELMERS, et al.,

*Respondents.*

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## BRIEF FOR PETITIONER.

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## DECISIONS BELOW

The District Court for the Southern District of Ohio overruled respondents' motions to dismiss (R. 23, 30).[1, 2] Though there were about 300 defendants, by agreement, judgment was entered only against four for the purpose of appeal (R. 30). The Sixth Circuit Court of Appeals reversed the District Court and ordered the bill dismissed on the ground that petitioner's bill of complaint showed the cause of action was barred by the Kentucky Statute of Limitations, borrowed under an Ohio Statute (R. 2) (156 F. [2d] 47).

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[1] Not reported.

[2] Pages of that part of Record showing Proceedings in District Court and the part showing Proceedings in Court of Appeals are both numbered from page 1.

This Court granted certiorari and transferred the case to the summary docket, assigning it for argument immediately following No. 593, by order entered December 9, 1946 (15 U. S. Law Week 3224). Case No. 593 is *Cope* v. *Anderson*, decided by the Third Circuit Court of Appeals and with which the decision below is in direct conflict.

## JURISDICTION

Jurisdiction is conferred on this Court to review the cause by writ of certiorari by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, § 347).

## STATEMENT OF THE CASE

Petitioner, the Receiver of the National Bank of Kentucky, brought this suit, in equity, in the Southern District of Ohio against approximately 300 residents of that state to enforce their liability for an assessment levied by the Comptroller of the Currency against shareholders of the bank. Respondents' liability was an incident of their ownership of stock of a Delaware holding company which actually represented beneficial ownership of the bank's shares. The story is told in the opinion of this Court in *Anderson* v. *Abbott*, 321 U. S. 349, and we deem it unnecessary to more than briefly note these facts.

The National Bank of Kentucky, located in Louisville, Kentucky, closed November 16, 1930 (R. 1). The Comptroller of the Currency found the bank insolvent, appointed a receiver (R. 2), levied a 100 per cent assessment against shareholders, payable April 1, 1931, and directed the receiver to enforce its payment (R. 2).

The shares of the bank were registered in the names of six trustees under a lengthy trust indenture (R. 5). The trustees issued so-called Trustees' Participation Certifi-

cates (R. 6). About 95 per cent of these certificates (R. 9), representing stock of the bank for all purposes, including liability to assessment, were exchanged for shares of stock of a Delaware corporation named "The BancoKentucky Company," hereinafter referred to as "Banco" (R. 13). Banco was organized under the ordinary corporation laws of Delaware with omnibus powers. Unlike the Participation Certificates, the shares issued by Banco purported to be "non-assessable" (R. 14). Banco was a holding company for bank stock, not only the stock of the National Bank of Kentucky but of various other National and State Banks located in Kentucky and Ohio (R. 12).

The Receiver brought suit against Banco for the assessment on the Trustees' Participation Certificates and recovered judgment. *Laurent* v. *Anderson*, 70 Fed (2d) 819 (C. C. A. 6th) (R. 17). Prior to that suit, and solely to preserve his rights against holding company shareholders, the Receiver sent a warning notice to them stating it to be his intention to proceed against Banco, but that he would look to them for any deficiency (R. 16). The Receiver was able to collect only a small part of the assessment from Banco (R. 17). He then brought actions in numerous states against holding company shareholders residing therein to recover the deficiency. The bills of complaint were the same. The Receiver was compelled to sue in equity to disclose the beneficial ownership of the bank's stock in Banco's shareholders and to eliminate the paper partitions they had set up between themselves and direct ownership of the bank's shares which they claimed insulated them from liability. The suit in the Western District of Kentucky became the test case and finally settled the question of the liability of Banco's shareholders. (*Anderson* v. *Abbott*, 321 U. S.

349.) During the pendency of that case, the other suits were held in abeyance.

The present action was commenced December 12, 1936, more than five years but less than six years after the assessment became due. The National Bank Act contains no period of limitations so the limitation of the forum, Ohio, is applicable. The Ohio general statute governing actions to enforce statutory liabilities requires suit within six years. G. C. § 11222. But Ohio also has a "borrowing" statute.

> "*If* the laws *of any* state or *country where the cause of action arose* limits the time for the commencement of the action *to a less number of years* than do the statutes of this state in like causes of action, then said cause of action shall be barred in this state at the expiration of said lesser number of years." G. C. § 11234.[3]

In Kentucky actions on statutory liabilities are subject to the defense of the limitations unless commenced within five years after the cause accrued (Ky. Rev. Stat. § 413.120).

The sole question for decision here is one of substantive federal law—Did petitioner's cause of action arise in a state or country having a period of limitations shorter than Ohio's six year period?

## SPECIFICATIONS OF ERROR

1. The Sixth Circuit Court of Appeals erred in reversing the decision of the District Court.

2. The Sixth Circuit Court of Appeals erred in holding petitioner's cause of action arose in Kentucky.

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[3] Emphasis ours throughout this brief.

## ARGUMENT

### 1. What Is Petitioner's Cause of Action?

This Court has defined a cause of action generally as comprising "every fact a plaintiff is obliged to prove in order to obtain judgment, or, conversely, every fact the defendant would have the right to traverse." *Railway Co.* v. *Dixon*, 179 U. S. 131, 139. See also *Martin* v. *N. & W. Railroad Co.*, 43 Fed. (2d) 293, 295.

The National Bank Act provides that shareholders of national banking associations "shall be held individually responsible" to assessment to the extent of the par value of their stock therein "in addition to the amount invested in such stock." U. S. C., Title 12, §§ 63, 64. The Act authorizes the Comptroller of the Currency, when satisfied of insolvency, to appoint a receiver, "who shall proceed to . . . enforce the personal liability of shareholders" "if necessary to pay the debts of such association." U. S. C., Title 12, §§ 191, 192.

This Court has several times discussed the nature of a cause of action against national bank shareholders for assessment.

In *McClaine* v. *Rankin*, 197 U. S. 154, it was held that, apart from federal statute the receiver's "cause of action does not exist," that the basis of such cause of action is the Comptroller's order and that the statute of limitations runs "as against an action to enforce the statutory liability and *not an action for breach of contract.*" The law imposes the liability on the shareholder, secondary to the bank's debts, which remained distinct and to which the stockholder was not a party. Assessment might result as a consequence of the bank's breach of its contract to pay, but liability therefor "is collateral and *statutory*" (p. 161).

Again, in *Pufahl* v. *Parks*, 299 U. S. 217, 223, it was held that a stockholders' obligation to pay an assessment

is rendered absolute by the Comptroller's action in ordering one. "From the moment of the Comptroller's order for assessments the bank's receiver *has a claim which would support an action of debt at common law* against a living stockholder or the executor of a deceased stockholder." In *Brown* v. *O'Keefe,* 300 U. S. 598, 603 it was said: "Liquidation coupled with insolvency is the critical event which is capable of transforming a potential liability into *one presently enforceable* as soon as" a receiver appears upon the scene.

And, in *Anderson* v. *Abbott,* 321 U. S. 349, 356, the Court said that the principles of contract law have no application "to suits to enforce a liability which has this statutory origin. Cf. *Christopher* v. *Norvell,* 201 U. S. 216, 225." The Court there also indicated that these very Banco shareholders' liability was not "bottomed on fault" (p. 366). Their liability arose as "an incidence of ownership" (p. 368).[4]

The National Bank of Kentucky, though domiciled until its suspension in Louisville, Kentucky, has nothing to do with this suit. The petitioner, as Receiver, is an officer of the United States, appointed by the Comptroller of the Currency and subject to the latter's direction. *United States* v. *Weitzel,* 246 U. S. 533; *Anderson* v. *Hershey,* 127 Fed. (2d) 884 (C. C. A. 6th). He sues as a trustee for persons who were creditors of the defunct bank. The order of assessment was a quasi-judicial determination. *Hays* v. *Wilkinson,* 72 Fed. (2d) 201 (C. C. A. 10th). It was the basis of the suit. Respondents are citizens and residents of Ohio. Their liability arose out of the ownership of intangible personal property—BancoKentucky stock. The situs of that stock, "for all

[4] The statute of limitations is not tolled by partial payments because there is no promise, or contract to be so revived. *Briley* v. *Crouch,* 115 Fed. (2d) 443 (C. C. A. 4).

purposes of title'' except taxation, was Delaware by the very terms of their contract of membership in the Delaware corporation. Sec. 73, Del. Corp. Law. For purposes of taxation the situs of the stock was Ohio. 51 Am. Jur., Taxation, pp. 496, 497. Respondents had no contract with anyone with respect to assessment liability. In fact their certificate of stock and the holding company's Articles of Incorporation expressly negated any recognition of such liability.

**2. Where a Cause of Action Arises Is Determined with Reference to the Substantive Law Which Shapes It.**

The meaning of the Ohio Borrowing Statute is clear. ''If the laws of any state or country where the cause of action arose'' provide a shorter period than Ohio's, then the Ohio courts will adopt that period.

A ''state'' is an organized political society with an established government which exercises sovereign power within the territory occupied by its people. The Ohio statute does not limit the word to the states which comprise our country. Nor is the word ''country'' qualified by ''foreign.'' It says ''any country.'' United States is a ''country.'' And it is the country where petitioner's cause of action arose because that cause was generated solely by federal statute. The court below conceded that ''the liability is created by a law of the United States, *rather than by the law of Kentucky or of any other state.*'' But it was of the opinion that the ''cause of action arose through a combination of that law and the failure to perform the duty imposed by that law'' (R. 12).

The ''country where the cause of action arose'' in the Ohio statute has reference to a system of jurisprudence other than Ohio's, not necessarily to territorial limits. Governments in exile are recognized as sovereign because exercising sovereign power. *Delany* v. *Moraitis*, 136 Fed. (2d) 129, 131.

The place "where" is important only insofar as the laws of that place are controlling. Had respondents agreed to perform some contract in Kentucky, the law of that state would determine the substantive rights of the parties. But here the limits, territorial and otherwise, of the reach of Kentucky law simply have no significance. See *Holmberg* v. *Armbrecht*, 327 U. S. 392.

The court below lost sight of the fact that our federal government and state governments are separate sovereignties.

> "Although the general government and the states exist within the same territorial limits, each form of government, whether Federal or state, is supreme within its sphere, the former as to all powers granted, expressly or impliedly, under the Federal Constitution, and the state as to all other powers." 11 Am. Jur., Constitutional Law, page 866.

The opinion of the court below (R. 12) characterizes petitioner's argument that the cause arose in the "country" as highly theoretical because it disregards the fact that, geographically, the United States comprise the 48 separate states and the District of Columbia. It is said, "If the critical act occurred within the geographical limits of the United States, it necessarily occurred within the geographical limits of one of the forty-eight states or the District of Columbia" (R. 12). The basis of this suit is the Comptroller's order and respondents' ownership of Banco stock. The assessment order was made in Washington which is in the District of Columbia, geographically, but the fact the nation's capital is there has no meaning when the force and effect of the order is considered.

Since the laws of the country creating petitioner's cause of action provided no period of limitations to be

borrowed, it is subject only to the general limitation of the forum. There is no limitation to be borrowed under the exception to the general law of the forum.

**3. Failure to Pay Is Not an Essential of Petitioner's Cause of Action and, if It Were, and if the Law Fixed a Place for Payment, Such Fact Would Only Concern the Time When, Not the Place Where, Petitioner's Cause Arose.**

The court below was of the opinion that a cause of action arises at the place where the operative facts occur and that it is the happening of the last of such facts which brings the cause of action into existence. It is stated— "Such an act, or the failure to act where there is a duty to do so, is the critical event which transforms a potential liability into one presently enforcible. See *Brown* v. *O'Keefe*, 300 U. S. 598, 603" (R. 8).[8]

Events which mature a cause of action are not necessarily determinative of the place where one arises. In this connection, the opinion below states (R. 8): "A person may execute a note payable in the future. Such an obligation is a liability, but it does not become a cause of action *until* the note matures and the maker fails to pay." But execution of a note does unalterably fix the jurisdiction where the cause of action may arise, by importing that law into the contract. It is the law of the place for payment, if specified, or of the place of execution, if there's no place for payment. What happens thereafter only establishes the "time when." Furthermore, if the analogy of note cases be assumed, the principles of contract law demonstrate that neither failure to pay the Receiver in Louisville or any other place nor the

[8] But *Brown* v. *O'Keefe* held that the "critical event" which transformed the shareholder' potential liability "into one presently enforcible" was "liquidation coupled with insolvency."

location of the bank in Louisville, prescribe where his cause of action arose. Suppose respondents held a note of the National Bank of Kentucky, payable at its offices in Louisville and endorsed it at Cincinnati to petitioner, personally. The note matures, and the bank fails to pay. The cause of action against the bank arose in Kentucky. But the cause of action against respondents arose where they endorsed it, in Ohio. The place of the bank's default would be unimportant in a suit on the endorsement. 11 Am. Jur., Conflict of Laws, § 151, p. 447; *Musson* v. *Lake*, 45 U. S. 262. And in such a suit the endorser's failure to pay is not an essential of the holder's cause of action against him. 8 Am. Jur., Bills and Notes, § 959, p. 566.[a]

The court below enumerated the operative facts in the present case,—(1) a federal statute; (2) insolvency of the bank; (3) the assessment; (4) the maturity of the assessment "by the passage of time to April 1, 1931"; and (5) defendants' failure to pay (R. 8, 9).

The important "operative fact" thus omitted was respondents' connection with the liability through their ownership of Banco stock. The "operative fact"—failure to pay—cannot be found in the bill of complaint.

No case can be found suggesting that a National Bank shareholder's failure to make payment of an assessment at the end of the grace period allowed him by the Comptroller is a fact to be alleged and proved by a Receiver in carrying out his statutory duty to "enforce" shareholders' liability, except the reversed decision by the District Court of Pennsylvania, in *Anderson* v. *An-*

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[a] Respondents incurred or "contracted" liability when they acquired Banco stock, as a statutory incidence of its ownership. *Anderson* v. *Abbott*, 321 U. S. 368. They lived in Ohio. The situs of that property was not Kentucky. And respondents' liability was "collateral and statutory" though arising in consequence of the bank's breach. *McClaine* v. *Rankin*, 197 U. S. 154, 161.

*drews,* 62 Fed. Supp. 705 (now the *Cope* case) and the decision below.

Having narrowed the issue to the determination of "where the failure to pay the assessment order in the present case occurred," the court below proceeded to answer that question solely by reference to the notice petitioner sent respondents on March 20, 1931 (R. 9). The assessment order fixed no place for payment. The court conceded that the receiver was not expressly authorized by the Comptroller's direction to enforce the assessment, to "designate" or to "fix" a place for payment, but concluded that the Comptroller's authority was broad enough "to include the designation of a place of payment as well as the time of payment, in the absence of any such contrary designation in the *contract* between the parties"[7] (R. 10). It was, of course, logical and reasonable for the Receiver to request payment at his office. But that is an entirely different matter from finding the Receiver empowered by law to "fix" a place for the performance of this "contract" without the assent of those who have always steadfastly denied any duty to pay, either contractual or statutory. No authority can be found for the conclusion that the Receiver could, unilaterally, fix a place for performance of respondents' duty to pay merely because he was directed to "take all necessary proceedings to enforce the assessment."

But, not only did the Receiver have no right to modify Banco shareholders' obligation in this regard, he did not even attempt to do so, as repeatedly decided by the

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[7] In *Anderson* v. *Abbott*, 321 U. S. 349, any element of contractual liability on Banco shareholders' part was denied (pp. 355, 368). The dissenting opinion put it even more forcefully (p. 372).

"On the contrary, by the terms of the stock certificates and by the law of the corporation's being, their shares were fully paid and non-assessable. *These stockholders cannot be said in any way to have assumed any express or implied contractual assessment liability.*"

court below. The notice to which reference was made had been discussed in *Anderson* v. *Abbott*, 127 Fed. (2d) 696, 699; again in *Abel* v. *Anderson*, 148 Fed. (2d) 372, and it was construed by this Court in *Anderson* v. *Abbott*, 321 U. S. 349, 354. All it purported to do was to warn holding company shareholders that the Receiver intended to look to them for what he was unable to recover from the holding company. It was in anticipation of the defense, later asserted and overruled, of election of remedies. See *Anderson* v. *Atkinson*, 22 Fed. Supp. 853, 855.

This warning notice was sent to Banco shareholders March 20, 1931. Had that notice purported to be a demand upon them for payment of the assessment at any place before April 1, 1931, the demand would have been premature. In *Fisher* v. *Whiton*, 317 U. S. 217, this Court held that the Receiver had no right to demand payment until the date fixed therefor by the Comptroller.

The period from the date the assessment was levied until it became payable was merely a grace period allowed by the Comptroller. *Strassburger* v. *Schram*, 93 Fed. (2d) 246; *Reich* v. *Van Dyke*, 107 Fed. (2d) 682. National bank's stockholders are not entitled to such a grace period as a matter of right. It is not even necessary that they be notified of the assessment. *Brown* v. *Ellis*, 103 Fed. 834; *Rankin* v. *Miller*, 207 Fed. 602, 611. Only one fact occurred subsequent to the order of assessment here which had any connection with the Receiver's cause of action—the arrival of April 1, 1931. *Rawlings* v. *Ray*, 312 U. S. 96, 98, and this Court's comments on *Pufahl* v. *Estate of Parks*. That event was not confined to Kentucky.

The court below was led to err by its acceptance of respondents' argument that principles of tort and contract cases are applicable here. The three cases cited in

the opinion (R. 11) involved suits for damages arising from wrongful acts. In each of those three cases the plaintiff had an opportunity of suing the wrongdoer in the state whose period of limitations was borrowed. The inference is justified that the forum of suit was deliberately selected to secure the advantage of a longer period of limitations. Petitioner had no such choice in the instant case. He never could have sued in Kentucky.

The court below accepted the conclusion of this Court that Banco shareholders' liability existed without fault[6] on their part but avoided applying it by an assumed distinction in this regard between a "liability" and a "cause of action." It is said the "cause of action came into existence by reason of the failure of the defendants to pay the assessment at the time and place provided. A failure to perform a legal duty at the time required is equivalent in the present case to an affirmative act" (R. 11). If that fact were important it might be the equivalent, in the sense of accruing a cause of action, or in incurring a liability, but certainly not in the sense of *where* a cause of action may arise. In both tort and contract cases the place where liability, potential as it may be, is incurred determines where the cause of action arose. An affirmative act has location. Respondents' only affirmative act was their acquisition of Banco stock.

The court below suggested that, if Banco stockholders had paid the Receiver before April 1, 1931, no cause of action would have at any time arisen or existed against them (R. 9). If that be true, a necessary allegation in petitioner's bill of complaint would have been that the

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[6] There was no dissent on this point in *Anderson* v. *Abbott*, 321 U. S. 349. The majority said the liability was "not bottomed on fault" (p. 366) and the dissenting opinion said "We are dealing with a variety of liability without fault" (p. 380). And the court was not discussing a mere potential liability, but a matured cause of action against Banco shareholders.

respondents had failed to pay. For centuries it has been the law that payment is an affirmative defense and evidence thereof usually may not be received unless specially pleaded, even in cases where a petitioner has unnecessarily alleged non-payment. Annotation 100 A. L. R. 264; *Kalloch* v. *Hoagland*, 239 Fed. 252 (C. C. A. 6th). Rule VIII of the Federal Rules is to the same effect. Non-payment cannot generate a cause of action. Payment, if pleaded and proved, will extinguish a cause of action.

The defense of limitations was only one of the many grounds included in respondents' motion to dismiss. One of the other grounds was— "There are no facts alleged sufficient to constitute a valid cause of action in equity" (R. 21, 22). That ground has been abandoned by respondents. Not since the District Court found the bill to state a good cause of action, in *Anderson* v. *Abbott*, 23 F. Supp. 265, has anyone suggested that it does not. Nevertheless, the Court below localized petitioner's cause of action in Kentucky because of respondent's failure to pay there, a fact not alleged at all.

The effect of the conclusion, that respondents' failure to pay was a "critical event," the last "operative fact" essential to petitioner's cause of action and localized in Kentucky, is to hold petitioner's failure to negative a non-existent defense resulted in his bill of complaint stating no cause of action.

## CONCLUSION

The cause of action arose in the "country," the statutes of which provide no limitation to be borrowed. Petitioner's cause of action and right of action involved only two ultimate facts, namely, respondents' ownership of property subjecting them to liability under national law and the recitation of the necessity of an officer of

the National Government enforcing that liability. The only traversable facts were those showing respondents' status as shareholders of the bank. The law of the country, plus that status, presented a cause of action. The actionable consequences of acts giving rise to a cause of action in tort or in contract are determined with reference to the *lex* loci. So far as this cause of action is concerned, the law of Kentucky and the territorial limitations of that state do not exist.

It is respectfully submitted that the decision of the court below should be reversed.

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IN THE

# Supreme Court of the United States

October Term, 1946

A. M. ANDERSON, Receiver,

*Petitioner,*

v.

LAWRENCE S. HELMERS, et al.,

*Respondents.*

No. 656

## REPLY BRIEF FOR PETITIONER


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No. 656

A. M. ANDERSON, Receiver, *Petitioner,*

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LAWRENCE S. HELMERS, et al., *Respondents.*

## REPLY BRIEF FOR PETITIONER

### STATEMENT OF THE CASE

Respondents assert that vitally important facts were omitted in Petitioner's statement of the case.

1. The substance of the notice to Banco shareholders was set forth in Petitioner's Brief. Respondents ignore the language of that notice, as an entire communication, as well as its obvious intent, and stress only "payable at the Office of the Receiver." The words were not in the Comptroller's order at all and were not authorized by either the National Bank Act or the Comptroller's directions to the Receiver. These few words represent the thread upon which Respondents' case hangs.

Neither notice of the assessment nor demand for its payment are necessary preliminaries to suit to collect a na-

tional bank stock assessment. Respondents apparently accept that as the law, for no comment is made on the cases so holding, discussed on page 12 of Petitioner's Brief. Nor is there any comment made on the holding in *Fisher* v. *Whiton*, 317 U. S. 217, that a national bank receiver's demand for payment, before the expiration of the grace period allowed by the Comptroller, is premature and unauthorized by law. It is difficult to understand how a suggestion volunteered by the Receiver, even though it be assumed to have been a demand on *Banco* shareholders to pay in Kentucky, could have resulted in the imposition of some new duty on Respondents. Not only was that notice premature, as a demand, but it indicated that the amounts holding company shareholders would be expected to pay would be unknown until a deficiency on Banco's liability had been established.

2. The assessment order is quoted in full, with emphasis on the word "requisition" and on the recitation that the Comptroller thereby made "demand" upon shareholders of the National Bank of Kentucky. Respondents were not holders of shares of stock issued by the bank. The notice advised them the Receiver would seek from them the "liability represented by the said trustees' participation certificates held by said BancoKentucky Company," to the extent he was unable to recover from Banco.

Section 191 of the National Bank Act (Title 12 U. S. C. § 191) requires a receiver, in mandatory language, to "enforce" shareholders' liability. The only way that may be done is by suit. Respondents do not deny that the Comptroller had the power, upon deciding that an assessment was necessary and fixing its amount, to direct the Receiver to proceed immediately by suit to enforce claims. Of what consequence then a demand by the Comptroller to pay at a future time? No present compliance was suggested.

The word "requisition" in the assessment order is defined by Respondents as "an authoritative demand." The inference seems to be that by describing the word as "authoritative," it thereby becomes lawful. The same source from which Respondents quote the definition contains this sentence:

"Law. A formal demand for the performance of an obligation, esp. one made through a notary."

The liability of a tort feasor certainly is not affected by a demand for damages. The liability of the maker of a note, who has himself promised and agreed to perform at a certain time or place, is unaffected by the holder's "demand" that he perform his agreement.

*McDonald* v. *Thompson*, 184 U. S. 71, 76, is said to present similar procedure, where similar language was held to be a demand for payment. That case held that the statute of limitations began to run against the receiver on the date fixed by the Comptroller. The receiver could not toll the statute by merely neglecting to demand payment. The language to which Respondents refer was merely the court's comment on the obviously unfounded argument of the receiver,—that the statute did not begin to run against him until he made demand.

3. The stipulation as to the place of the bank's operations, Kentucky, is conceded by Respondents to be merely the recitation of an express provision of the National Bank Act. It adds nothing whatever to this case.

## SUMMARY OF RESPONDENTS' ARGUMENT

The decision of the court below is said to be correct for the following reasons:

(1) The limitations law of the forum applies. That has never been disputed, as Respondents discover, at page 23 of their Brief.

The limitations law of the forum applies though the cause of action be asserted on the equity side of the court. That has never been disputed.

(2) The Ohio borrowing statute adopts the period of limitations of the jurisdiction "where the cause of action arose." This has never been disputed.

(3) Respondents insist the lower court was correct in holding the cause of action arose in the state of Kentucky because (a) that was the place for Respondents' performance, and (b) all the operative facts which gave rise to the cause of action occurred in Kentucky. Respondents ignore completely that the claim against them arose out of the fact of their ownership of stock of a Delaware corporation, plus the legal consequence of liability under national law.

(4) The Kentucky period of limitations, controlling actions in Kentucky, is five years, a lesser period than Ohio's six-year period. If this action were in Kentucky, the period of limitations would not be tolled because Respondents were always residents of Ohio. There is no dispute about this section of Respondents' brief, except the assertion that the Ohio borrowing statute applies.

(5) The suit here was commenced more than five years, but less than six years, after it accrued. There is no controversy over when the cause of action accrued. *Rawlings* v. *Ray*, 312 U. S. 96, held that the time when a receiver's cause of action accrues is a question of substantive federal law. The court approved its earlier decision in *Pufahl* v. *Estate of Parks*, 299 U. S. 217:

> "that the non-discriminatory legislation of Illinois where the suit was brought was controlling. We observed that the contingent *obligation* of a stockholder to pay an assessment was rendered *absolute* by the Comptroller's action in ordering one and that from

> the *moment* of the order of assessment the receiver had a claim which would support *an action* at common law against a living stockholder. . . ."*

The question for decision in *Rawlings* v. *Ray* was "as to the *time when* there was a complete and present cause of action so that the receiver could enforce by suit the liability imposed" by federal law. The state or country where Petitioner's cause of action arose is equally a matter of substantive federal law.

## "MISCONCEPTIONS INVOLVED IN PETITIONER'S ARGUMENT"

1. Petitioner is charged with confusing the term "liability" with "cause of action." What is the difference in connection with the question of where the cause of action arises? There is a difference when the question is *when* a cause of action has matured to a present right to sue. But where a cause of action "arose" requires consideration of the inception of the liability asserted, before its maturity as a complete cause of action. It is said that the federal law did not create the cause of action here any more than the execution of a note creates a cause of action before default in payment. The short answer to this point is that Respondents confuse the "time when" a cause of action accrues, with "place where" it arises. When a maker or endorser executes and delivers a promissory note the place where a cause of action may arise becomes a closed subject. So far as the maker is concerned, any cause of action asserted against him arises where he agreed it should. The "where" concerns applicable law, not geography.

The court below assumed there was an important distinction between a "liability" and a "cause of action." It

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* All emphasis Petitioner's, unless otherwise noted.

said the "cause of action came into existence by reason of the failure of the defendants to pay the assessment at the time and place provided. A failure to perform a legal duty at the time required is equivalent in the present case to an affirmative act (R. 49)." Failure to perform a legal duty may be the equivalent, in the sense of accruing a cause of action, but it is not the equivalent in the sense of *where* the cause arose.

The fundamental dispute in this case is disclosed by Respondents' contention that the Ohio borrowing act "does not borrow as Petitioner seems to assume, the limitations of the jurisdiction whose laws created the liability. As far as that statute is concerned, it is immaterial under what *law* the liability was *created* or whether it was created by law or by contract. The statute borrows only the applicable period of limitations of the state "where the cause of action arose.'" Respondents stress only geography. The jurisdiction in which a cause of action arises depends on which political entity is sovereign in the field, the state or the United States.

2. Petitioner has never contended that the order of assessment "matured" the cause of action so as to immediately permit suit. Respondents still confuse time with place. The lapse of time between the Comptroller's determination that an assessment was necessary, until the expiration of the grace period he allowed, has no bearing on the nature or essentials of Petitioner's cause.

As Dean (now Judge) Clark has said:

> "The cause of action under the record should be viewed as an aggregate of operative facts which give rise to one or more relations of right-duty between two or more persons." Clark: The Court Cause of Action (1924), 33 Ill. L. J. 817.

The language of *Pufahl* v. *Estate of Parks*, 299 U. S. 217, 223:

> "From the moment of the Comptroller's order for assessment the bank's receiver has a claim which would support an action of debt at common law"

was approved in *Rawlings* v. *Ray*, 312 U. S. 96, 99. In the *Pufahl* case the shareholder never had an opportunity to fail to pay. He died three years before the insolvency of the bank and the assessment. When his liability matured to an enforcible debt, by the Comptroller's order, it was enforcible against the executor as an obligation of the decedent. *Fisher* v. *Whiton* considered only when a receiver's cause of action matured to a right to sue. It limited in no way the earlier pronouncement as to what the cause of action was. The Court was considering not cause of action as the aggregate of operative facts. The Comptroller's order of assessment usually restrains the receiver's assertion of the absolute cause of action by postponing the right to sue. Respondents' statement—"Hence not merely the assessment but failure to pay the assessment is necessary to ripen the liability into a cause of action"—is an attempt to improve upon the above decisions of this Court, by the addition of "failure to pay" to mere lapse of time after the Comptroller's order.

3. Respondents' comment on the undeniable fact, that non-payment is here as an hypothetical operative fact and not part of the cause of action asserted, is:

> "But, in an action on an obligation for the payment of money, non-payment is universally held to be an essential part of the cause of action that must be alleged in the complaint. 48 C. J. 665, Sec. 129."

The cited text is as follows:

> "Non-payment need not be alleged in the petition, declaration, or complaint, except where failure to pay

> must be stated as an essential element of the cause of action, as for example, in an action on a contract, the breach of which consists of non-payment, although such an allegation is not improper."

To the same effect, 40 Am. Jur. Payment, Sec. 226, page 867, and authorities cited at page 14 of Petitioner's Brief.

Non-payment is not only "universally" held to be an essential part of a cause of action, but that is also true, say Respondents, in those jurisdictions where payment is an affirmative defense, citing *Lent v. Ry. Co.*, 130 N. Y. 504, 510, 29 N. E. 988 (1892). There, property owners sued to recover an award in railroad condemnation proceedings, asserting a right under New York statutes. The New York statute permitted such suit only after the recording of the order of award and after the railroad had neglected to make payment or the deposit required as a condition precedent to passage of title to it. The railroad company's obligation was conditioned upon its neglect or failure to pay, and that non-performance was, of course, an essential element of a landowner's cause of action.

New York is in accord with the general rule to which reference was made at page 14 of Petitioner's Brief. One of the New York cases cited in 100 A. L. R. 275, should be sufficient. It held that the allegation that rent became due and payable, was a mere conclusion of law, not of fact, and a general denial of all allegations, including non-payment, was not sufficient to permit proof of payment. *Fuller Co. v. Manhattan Const. Co.*, 88 N. Y. S. 1049 (1904).

Attention is directed to the words "due from each stockholder." That is represented to be the equivalent to an allegation of non-payment, citing 8 Am. Jur. p. 565, Sec. 957. That text is as follows:

> "As a matter of pleading it is necessary for the plaintiff in an action on a bill or note to allege the non-

payment thereof, although it is not necessary for him to support such allegations by any proof other than that which is necessarily atten 'ant on the introduction of the note in evidence or its proof in case the note or bill has been lost or destroyed."

In the latter event, the holder of a note "is obliged only to prove the note, leaving the burden on the defendant to establish payment where such is his defense." 8 Am. Jur., Bills and Notes, p. 619, Sec. 1036.

4. Petitioner's contention that the United States is a "country," within the meaning of the Ohio borrowing act, is answered with an argument which leads to the conclusion that there is no such country, that the United States is merely the collective name of the states. Following the reasoning of the court below, respondents say it is inconceivable that a cause of action can arise in the United States. It can only arise in some state.

Respondents urge the theory of the court below, that a critical act within the geographical limits of the United States must necessarily occur within the geographical limits of one of the states composing it. Geographically, the statement is perfectly correct. An act within the United States must also occur between a parallel of latitude and a meridian of longitude, within some group of states, on one side or the other of the Mason-Dixon Line, within the boundaries of some township within the area serviced by West Publishing Company's National Reporter System. Of what significance are such markers? It is law which fixes the legal consequences of transactions. Usually, obligations arise by reason of the law of the state where the acts constituting the transaction occur. "Except for the very limited obligations created by Congress, e.g. *Holmberg* v. *Armbrecht*, 327 U. S. 392, a debt is not brought into being by federal law." *Vanston Bond Holders Committee* v. *Green*, 15 U. S. L. W. 4063, 4066 (Dec. 9, 1946).

There are numerous instances where acts, critical events, or operative facts, occur within the geographical limits of a state, but their consequence is wholly a matter of the supreme law of the land. Under the reasoning of Respondents and the court below, a cause of action for wrongful death occurring within the boundaries of the state of Washington would arise there, but such a death in the Puget Sound Navy Yard did not arise in the state because federal law governed. *Murray* v. *Gerrich*, 291 U. S. 315. See also *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 530; *Arlington Hotel* v. *Fant*, 278 U. S. 439.

Respondents imply that "the United States" is only a political entity in the field of international law; that in "domestic law the United States is 'the collective name of the states which are united by and under the Constitution,'" citing *Hooven* v. *Evatt*, 324 U. S. 652, 672, and Langdell, The Status of our New Territories, 12 Harv. L. R. 365, 371 (1899).

The context in which "United States" was used in the *Hooven* case, is as follows:

> "The relation of the Philippines to the United States, taken as the collective name of the states which are united by and under the Constitution, is in many respects different from the status of those areas which, when the Constitution was adopted, were brought under the control of Congress and which were ultimately organized into states of the United States."

The term as used in the Constitution—"laws of the United States"—"citizen of the United States"—is not used in the sense claimed by Respondents. Professor Langdell has this to say (12 Harv. L. R. 374):

> "It seems also to be used in the same sense in the phrase, 'citizen of the United States;' for it is only as

a unit, a body politic, and a sovereign, that the United States can have citizens,—not as the collective name of forty-five States."

The state of Rhode Island also thought the statutes of the United States were the laws of a government "foreign" in the international sense. It refused to enforce an overcharged buyer's rights under the Emergency Price Control Act on the theory that the federal statute was penal and that it was not obliged to enforce the penal laws of a government which was foreign in the international sense. This Court, in *Testa* v. *Katt*, 15 U. S. L. W. 4351 (March 10, 1947), assumed that the federal law was penal in every sense but found the reasons given by the Rhode Island court for declining to enforce it not "a valid excuse." The federal law is the prevailing policy in every state of the United States.

Respondents, in seeking the meaning of the Ohio borrowing statute—"any state or country"—claim that the word "country" was intended to refer only to "foreign" countries. How the words "any country" can be said to exclude our country, is not the result of interpretation. The insertion of a word foreign to the statute is sought to be rationalized by the argument that it can not be assumed the Ohio legislature intended the statute to be a vain thing; since there is no general federal statute of limitations to be borrowed, to consider our country as a "country," would strike down the defense of the borrowing statute; the Ohio legislature could not have intended such a vain result. Ohio has a general statute of limitations of six years, which the legislature apparently believed wholly adequate protection to Respondents. Clearly the legislature did not intend the limitations law of some other sovereign to be borrowed in every case where the cause of action did not arise by virtue of Ohio substantive

law. Where a cause of action admittedly arises in another jurisdiction, Ohio does not borrow the limitations law of such jurisdiction. It does so only "if" that period is shorter than Ohio's. If that period is longer than Ohio's, the borrowing act is as vain as it is in the present case.

Respondents' interpretation of "any country" as meaning only some "foreign" country, is thought to be supported by the interpretation of a Missouri statute referring to corporations organized under the laws of "any *other* state, territory or country." Obviously, "other country" excludes the United States.

## "A CAUSE OF ACTION ARISES AT THE PLACE WHERE THE OPERATIVE FACTS OCCUR. IN THE CASE OF AN OBLIGATION TO PAY MONEY, IT ARISES AT THE PLACE FIXED FOR PAYMENT"

The above heading is misleading in its connotation of "place where" as being a matter of geography rather than law. It also assumes that either the federal law or some imaginary contract required performance by Respondents at some particular place.

Respondents say "where the obligation is solely for the payment of money, the cause of action is held to arise at the place fixed for payment—non-payment being the operative fact that finally matures the cause of action." Except where a contract is anticipatorily breached, a cause of action on a contract does arise at the place fixed for performance. That is exactly what the parties have agreed. Non-payment may or may not be an operative fact. It is only so when it is an essential element of a plaintiff's cause of action. But in any event, non-payment, if the cause of action is for breach of contract, does nothing more than Respondents claim for it. It "finally *matures* the cause of action."

Accepting Respondents' premise that "where the cause of action arose" has acquired a well recognized meaning, the authorities cited have no bearing on the problem at hand (see footnote on p. 14).

In *West* v. *Theis*, 15 Idaho 167, 96 P. 937 (1908), the debtor executed a promissory note in the state of Kansas and "agreed to pay the same within a specified time and place within the state." Of course the cause of action arose in Kansas.

The definition of a cause of action given by the court below—the combination of facts which gives rise to a right of action, the existence of which affords a party a right to judicial interference in his behalf—is cited. What judicial interference did the law or the courts of Kentucky afford Petitioner? Kentucky could not legislate on the subject of the cause of action. Petitioner could not have invoked judicial interference of Kentucky courts because Respondents were residents of Ohio. The same quotation indicates the error of the lower court in its reasoning that the happening of the last operative fact brings a cause of action into existence. "Such an act, or the failure to act where there is a duty to do so, is the critical event which transforms a potential liability into one presently enforcible. See *Brown* v. *O'Keefe*, 300 U. S. 598, 603." The court below was under the misapprehension that the maturity or accrual of a cause of action determines where it arises. In *Brown* v. *O'Keefe*, this Court did not say that failure to pay was an operative fact. "Liquidation coupled with insolvency is the critical event which is capable of transforming a potential liability into one *presently enforcible*. . . ."

It is true that many courts hold that a defendant's residence has no bearing on the place where the cause of action against him arises. Practically all of the states have borrowing statutes and their terminology varies widely. Many

states recognize that it is unfair and unreasonable to give a resident the benefit of the shorter period of limitations of another state when he was never subject to suit there. Despite the hopeless conflict in the various state court decisions, interpreting differing statutes, the following text appeals to reason:

> "All of the foregoing principles are subject to the indispensable preliminary factor that a statute admitting the bar of another state should not be held to supply a defense if in fact the courts of such other state have not been in a position to afford relief." 11 Am. Jur. Conflict of Laws, p. , Sec. 197.

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The cases cited at the bottom of page 11 and page 12 of Respondents' Brief all involved state created rights. The causes of action for breach of contract arose in a state either because the parties had agreed performance was required there, or because the agreement was anticipatorily breached there. *Payne* v. *Kirschwehn*, 141 O. S. 384, 48 N. E. (2d) 224 (1943), arose over a promissory note executed and payable in Florida. In *Anglo-American Land Co.* v. *Lombard*, 132 Fed. 721 (C. C. A. 8, 1904), the court refused to borrow the period of limitations of another state. The Kansas borrowing statute was limited to causes of action between non-residents of that state. Residents of Kansas had the benefit only of their general period of limitations. *Klotz* v. *Angelo*, 220 N. Y. 347, 116 N. E. 224 (1917), was a tort case arising due to false representations made in Missouri. *McKee* v. *Dodd*, 152 Cal. 637, 93 P. 854, was a promissory note case, the note being payable at a particular place. *B. & O. R. R. Co.* v. *Reed*, 223 Fed. 689 (C. C. A. 6, 1915), was a tort case. The Ohio District Court borrowed the Indiana statute of limitations in an action for damages for personal injuries sustained in Indiana, and commented on the fact that the plaintiff could have at all times sued the railroad company in Indiana. *Hilliard* v. *Penna. R. R. Co.*, 73 F. (2) 473 (C. C. A. 6, 1934), was a tort case, identical in principle with *B. & O. R. R.* v. *Reed*. *Anglaize Box Board Co.* v. *Kansas City Fibre Box Co.*, 35 F. (2d) 822 (C. C. A. 6, 1929), was a contract case. The contract was anticipatorily breached in Kansas. The Kansas period of limitations was borrowed under the Ohio statute. The buyer's place of business was in Kansas City and it had always been suable there. *Pond Creek Mill and Elevator Co.* v. *Clark*, 270 Fed. 482 (C. C. A. 7, 1920) was an action for breach of contract. The breach occurred in Oklahoma and the cause of action arose there. While suit was in Illinois, the defendant was a resident of Oklahoma. The limitations period of that state was borrowed. Defendant was amenable to action in that state. *Weaver* v. *Cusrin Co.*, 206 N. Y. 506, 100 N. E. 488 (1912) was a case of anticipatory breach of contract. The contract was performable in Argentina, but the breach occurred in New York, so the cause of action arose there. The question was one of jurisdiction depending upon whether the breach occurred in New York. (Continued on p. 15.)

Respondents assert that the same rule applicable to state created contract and tort rights, applies to federally created rights. In *Seaboard Terminals Corp.* v. *Standard Oil Co.*, 59 F. Supp. 91, 104 Fed. (2d) 569 (C. C. A. 2, 1939), it was held that a cause of action under the federal antitrust laws arose in Maryland as to the *two defendants who were subject to suit there*. The business of the plaintiff, a Maryland corporation, was injured by defendant's practices in Maryland. The New York District Court borrowed the Maryland statute of limitations. As to Socony-Vacuum Company, there was no such borrowing because it did not appear that it was subject to suit in Maryland. Only the New York general statute of limitations was applicable to that defendant. The New York borrowing statute was interpreted differently from Ohio's because the courts in New York would not borrow the limitations period of a state where the defendant was not subject to suit.

Respondents next cite *Bluefields S. S. Co.* v. *United Fruit Co.*, 243 Fed. 1 (C. C. A. 3, 1917). That also was an action

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*Payne* v. *Kirschwehn*, *supra*, is discussed at some length by Respondents as an excellent example of the principle that a cause of action arises at the place where payment should have been made. The case would be pertinent here if the liability sought to be enforced arose by virtue of Respondents' promise to pay in Louisville. The only contract which Respondents ever made concerning assessment liability was that appearing in their stock certificates, a contract between themselves and their holding company, in which they agreed Respondents should not be subject to liability. As the dissent in *Anderson* v. *Abbott* said (321 U. S. 349, 372):

> "These stockholders cannot be said in any way to have assumed any express or implied contractual assessment liability."

*McKee* v. *Dodd*, *supra*, a suit on a note payable in New York State, is quoted by Respondents, emphasizing the language of the opinion which stated that it was the duty of the maker to pay the note not only when it became due, but at the place he had agreed to pay it. True, the court said: "His failure in this regard gave rise to the cause of action, and clearly, therefore, that cause of action arose in the state of New York," but the court was not precise in the use of the words "gave rise." The cause of action arose in New York because the maker promised to pay there. The state in which the cause of action might later arise was fixed on the moment the note was executed and delivered.

for damages under the Sherman Act. The damage occurred in Louisiana. Suit was filed in Pennsylvania for the expressed purpose of avoiding the shorter Louisiana statute. Where the cause of action arose was not decided. The Court of Appeals affirmed the District Court's decision which found only the general statute of limitations of Pennsylvania applicable.

Next cited is *Hansen Packing Co.* v. *Swift & Co.*, 27 F. Supp. 364 (D. C. N. Y. 1939). The operative facts there consisted of damages sustained by the plaintiff, a Montana corporation, in that state. The court commented on the fact that, under the Clayton Act, the tort feasor was subject to suit in Montana. The distinctions between liability under the National Bank Act and liability for damages under the Antitrust Act is that in the latter case, suit may be instituted either in the district of the wrongdoer's residence or where its business activities result in the damage (Title 15, U. S. C., Sec. 22). And the federal antitrust laws do not preempt that field. State laws may regulate the same conduct. *Puerto Rico* v. *Shell Co.*, 302 U. S. 253. There is no state law on the substantive rights involved in Petitioner's cause of action and there could be none. The field occupied by the federal instrumentality of national banks excludes state interference. Petitioner had no alternative to select either Kentucky or Ohio as the forum for suit. Had suit been possible in Kentucky, there would be some reason for applying the adjective law of that state.

Causes of action under the Fair Labor Standards Act are held to arise in the state where the contract of employment was performed, as was held in *Smith* v. *Continental Oil Co.*, 59 F. Supp. 91 (D. C. N. Y. 1945). But why? Respondents neglect to give the answer. State laws are applicable because causes of action asserted under that federal Act are based upon contracts of employment which are properly within the sphere of state law. In the *Smith* case,

the contract of employment was made and performed in Oklahoma. The New York court held the cause of action arose there. The employee chose New York as the forum for suit, rather than Oklahoma, because he had permitted the latter state's period of limitations to expire. The court noted that the defendant could have been sued in Oklahoma. The only effect of federal law was to expand the terms of an express contract. The parties to such contracts necessarily enter them with those terms in mind. It is exactly that kind of right-duty relationship this Court had under consideration in *Vanston Bond Holders* v. *Green*, supra, where, after carefully excluding obligations arising under federal law, it said that "obligations exist or do not exist by force of state law. . . ." The Fair Labor Standards Act merely extends the terms of private contracts of employment. See *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 583; *Rigopoulos* v. *Kervan*, 53 F. Supp. 829 (D. C. N. Y. 1943); *Northwest Yeast Co.* v. *Broutin*, 133 F. (2d) 628 (C. C. A. 6, 1943); *Keen* v. *Mid-Continent Petroleum Corp.*, 58 F. Supp. 915 (D. C. Iowa, 1945).

## "THIS CAUSE OF ACTION AROSE IN KENTUCKY"

### (a) How the Cause of Action Arose.

The discussion under this subsection of Respondents' Brief concerns *when* suit is permissible by a national bank receiver. Of course, the National Bank Act does not create the cause of action. It merely establishes the law. The liability attaches upon a person's assuming the status of a shareholder by acquiring ownership of bank stock. His liability is no more potential than that of an endorser, a surety, a guarantor, or any other obligor on a contingent obligation. Failure of the bank is a step in the maturity of the shareholder's liability. His *liability* is not a "latent possibility"; it is only the occasion for his responding to

it that is potential or a mere possibility prior to the failure of the bank.

Respondents say that even after the Comptroller's order of assessment "the liability has not ripened into a cause of action." It has not ripened in the sense that the Receiver is permitted to bring suit, but where the cause of action arose, had theretofore been settled.

It is no more permissible to argue that—"Should a shareholder pay the assessment before the payment date, no cause of action would arise against him,"—than to say but for the shareholder's ownership of stock he would never be sued and that therefore, the only operative fact of significance is the time and place of his acquiring such ownership. The hypothesis—if a shareholder pays—is not in this case. No Respondent has alleged his payment and the Bill of Complaint does not mention it. Respondents may inject the subject of payment into this case only if their motions to dismiss are overruled and they wish to plead and prove such a defense.

**(b) "The Assessment Was Payable in Kentucky."**

It is claimed that even though the Receiver had not "directed" payment by shareholders of the bank and Banco in Kentucky, the assessment would have been payable there in any event under the familiar rule that where no place of payment is specified, it is the duty of the debtor to seek out the creditor and the obligation is payable at the creditor's place of business. The authority for that statement is 48 C. J. 592, 593 (Sec. 8). That text is as follows:

> "As a general rule, in the absence of any agreement or stipulation to the contrary, a debt is payable at the place where the creditor resides, or his place of business, if he has one, or wherever else he may be found; and it is ordinarily the duty of a debtor to seek the creditor for the purpose of making payment, *provided the creditor is within the state of his residence when payment is due, unless otherwise provided by statute.*"

The cases cited have to do with state created rights. As to them, there is no duty on the debtor to go outside the state of his residence to seek out his creditor.

Though it is said that, as a practical matter, Respondents had no other place to pay except Louisville, the practical answer is—that the place where they could pay was never of any concern to Respondents. As the Third Circuit Court of Appeals indicated in the *Cope* case, the Comptroller of the Currency, as an officer of the United States, was the principal charged with the duty of recovering and disbursing the assessment moneys. If it were important, the Comptroller would have undoubtedly accepted Respondents' payments in Washington. It is possible, too, that the Receiver would have sent a representative to Respondents' homes or places of business to accept payment. Respondents' imaginary difficulties on this subject should not be of importance here. The Court is considering not hypothetical situations or supposed facts, but where the cause of action asserted by the Petitioner arose. That cause of action is silent on the subject of payment. All Banco shareholders have been compelled to admit that the bill of complaint states a cause of action in its present language. Having no defense on the merits, they have been compelled to drag in, wholly by way of argument, as a crucial fact decisive of the jurisdiction in which the cause of action arose—failure to pay.

The English case, *Durham* v. *Spence*, L. R. Vol. 6 (1870-71) is cited for the proposition that the time when a cause of action arises also determines the place where it arises. There, the defendant challenged the validity of a writ served on him in Africa in a suit for breach of a marriage contract instituted against him in England. An English statute permitted such service either where a cause of action arose within the jurisdiction or where a breach of contract occurred within the jurisdiction. The contract was performable in England and the breach occurred there.

In addition to the language quoted by Respondents, the court said that the defendant could scarcely complain if he was sued for his default in the place where he said performance should be made.

In Petitioner's original Brief, the analogy was drawn between the cause of action against an endorser of a promissory note and that asserted against Respondents here (Br. p. 10). No comment is made by Respondents on that point or the authorities cited. Instead, Respondents say that the situation here is the same as if each Banco shareholder had executed a note to the bank payable in Louisville on April 1, 1931. It is said that upon the default in those notes, the resulting cause of action would arise in Louisville. Perfectly true. But not by reason of any default. The jurisdiction in which the cause of action arose was selected by the parties in their agreement making Louisville the place of performance. They agreed that the law of Kentucky would be controlling. In the situation supposed by Respondents, with Banco shareholders as makers of notes payable to the bank, the Receiver's cause of action against them would be identical with that of the bank's, and any defense good against the bank would be good against the Receiver. But Petitioner's claim here is not to collect an asset of the National Bank of Kentucky. His right against Respondents and the latter's liability to him is wholly distinct and separate from the bank. As originally suggested by Petitioner, suppose Banco negotiated a note to the National Bank of Kentucky, upon which Respondents' names appeared as endorsers and they had entered into their contract of endorsement in Ohio. The cause of action against them, whether asserted by the bank or its Receiver, would arise in Ohio because solely subject to its laws.

In support of the claim that the Comptroller or the Receiver had the power to "fix" the place of payment, reference is made to Section 191 of the National Bank Act which

says that the Receiver "shall proceed to . . . enforce the personal liability of shareholders." But the Receiver's March 1931 notice, at most a premature suggestion of the acceptability of money expected to be owing at a later date, could have no such effect as imposing a different kind of liability than that to which Respondents were already subject under the law. That could hardly be described as a proceeding to "enforce" the liability. *Wittnebel* v. *Loughman*, 9 F. Supp. 465 (D. C. N. Y. 1935) is cited for the principle that the Receiver's powers are to be liberally construed. The District Court there said that the National Bank Act should be liberally construed with reference to powers of the Comptroller and the receiver in order that expeditious and just winding up may be achieved. The court relied on *Korbly* v. *Springfield Institution for Savings*, 245 U. S. 330, where the liberal construction of the act was said to be for the purpose of promoting the closing up of the affairs "and paying the debts of such unfortunate institutions." The liberality was in the interests of the depositors and creditors, not those in the position of Respondents here. See *LaParr* v. *City of Rockford*, 100 F. (2d) 564 (C. C. A. 7; cert. den. 307 U. S. 624), where action of the Comptroller or receiver detrimental to the interests of depositors was held not to bind either. The action there was in excess of the legal powers of either the Comptroller or receiver.

Petitioner has not sought to avoid the effect of his notice by characterizing it as a mere "warning." The notice upon which Respondents base their defense had no effect. It was completely unnecessary. Its purpose was to avoid, if possible, the defense of election of remedies. This Court, in *Anderson* v. *Abbott*, indicated that there was no election regardless of that warning. The very case cited by Respondents, *Abell* v. *Anderson*, 148 F. (2d) 372 (C. C. A. 6, 1945), as have all other opinions interpreting that notice,

reached the same conclusion as to its meaning as Petitioner asserts here.

**(c) "The Insolvency Occurred in Kentucky Where the Bank Was Domiciled and Transacted Its Business."**

There is nothing in this subsection of Respondents' Brief in controversy except the conclusion that non-payment of the assessment in Louisville was an operative fact which gave rise to this cause of action. Where the bank did its business and where it failed is of no more importance in this case than inquiry into the reasons for its failure. This action is brought by an officer and agent of the United States on behalf of persons who were creditors of the bank. *Auten* v. *U. S. Nat. Bank*, 178 U. S. 125; *Oppenheimer* v. *Harriman Nat. Bank*, 301 U. S. 206; *Frank* v. *Giesy*, 117 F. (2d) 122, 126 (C. C. A. 9, 1941). If this were an action by the bank or by a receiver to enforce payment of some bank asset, on a private contract, then the place for performance or the place of execution or the place of breach might invite inquiry as to the state whose laws control those subjects. But the place where the bank failed or where it did business is as unimportant here as the place where or the reasons why a maker breaches his contract to pay a note, in a case where the liability is sought to be imposed upon one secondarily responsible.

Respondents find a striking analogy between the facts in *Hunter* v. *Niagara Fire Insurance Co.*, 73 O. S. 110, 76 N. E. 563 (1905). In that case not only was the insurance company at all times subject to suit in Florida, but the contract of insurance was applied for, signed and delivered in Florida. The cause of action arose in Florida because that was the lex loci contractus. Respondents' repeated reference to the word "ripened" again exhibits the erroneous conclusions reached by arguments premised upon the assumption that "time when" is synonymous with "place

where." The insurance case was a suit on an express contract. The rights and duties of the parties to that contract did not touch or concern federal law in any way. Here, as Respondents admit, "the liability was created by federal statute." In the *Hunter* case it is true that liability "ripened" by reason of the fire in Florida. It is also true that here the failure of the bank was an incident in ripening Respondents' liability. But the only law with which we are concerned here is the law of the country, not that of the state of Kentucky. *Forrest* v. *Jack*, 294 U. S. 158, 162; *Seabury* v. *Green*, 294 U. S. 165, 168. The state of Kentucky could no more trammel Petitioner's cause of action than did the law of the state of Delawafe. *Anderson* v. *Abbott*, 321 U. S. 349, 365.

Though the only issuable fact in Petitioner's bill of complaint was the Respondents' status with respect to the trustees' participation certificates held by Banco—that is, their ownership of property which fastened liability upon them—Respondents argue that the ownership of holding company stock "unaccompanied by insolvency of the bank and failure to pay an assessment, obviously cannot give rise to a cause of action." This is post hoc, ergo propter hoc *logic*. By the same process, it could be urged that but for the assessment, this litigation would not have resulted; but for Respondents' ownership of Banco stock, they would not be parties to this litigation. The mere execution and delivery of a promissory note does not give rise to a cause of action. The endorsement of a promissory note does not give rise to a cause of action. But if and when a cause of action does arise, it is the aggregate of the operative facts and not merely the incidents determining when the cause accrued, which are determinative.

In the *Vanston Bond Holder* case, *supra*, aside from the intervention of federal bankruptcy law, the place of business of the debtor and the location of the property pledged

to secure the bondholders' claims, all in Kentucky, had nothing to do with where the cause of action arose. It arose in New York and the right-duty relationship was controlled by New York law simply because that was the agreement.

## DISCUSSION OF THE THIRD CIRCUIT DECISION

Respondents represent that the *Cope* case is distinguishable from this, as set forth in their brief opposing certiorari. Respondents contended that if any conflict between this case and the *Cope* case exists, it is merely a conflict as to state law. Until the Third Circuit Court of Appeals reversed the erroneous decision of the District Court, Respondents maintained that the question in the two cases was the same.

The basis of the Third Circuit's decision certainly was not that the Comptroller of the Currency was the real recipient of assessment collections. The comment made by the court on that subject merely ended a discussion of defendant's argument that the cause arose in Kentucky, described as "all right if it is said quickly without parsing it" (Cope Record, p. 62). The observation concerning the ultimate recipient of the funds concluded the court's parsing. The basis of the decision is that a federally created right is here sought to be enforced, a right as extensive in its reach as the laws of the country creating it.

Judge Goodrich said that Petitioner is seeking to enforce "rights arising out of transactions governed by the federal government acting within its constitutional field." This basis was described by the court as a wider ground requiring a reversal. That ground was not the "second" at all.

Respondents profess doubt as to the meaning of the opinion of the Third Circuit in the *Cope* case, suggesting that, it if was meant "that the local law of limitations is

not applicable to the action, the decision is clearly incorrect." There is utterly no basis for such doubt. The court held the local law of limitations was applicable. It refused to apply the foreign law of the state of Kentucky.

The whole fallacy of Respondents' position is highlighted by the contention "that in determining the place where a cause of action arises the law by which the liability was created is of no materiality." If it is not the law, then it is wholly a matter of geography, a conception which is not permissible.

*Holmberg* v. *Armbrecht* is distinguished because there the right was a federal equitable right, while here the right is legal, though asserted on the equity side of the court. That case is said to have involved only the preliminary question presented here—whether any state statute of limitations was applicable. On this preliminary question, Respondents state at page 23 of their Brief, "There is no dispute in the instant case." The first point in Respondents' summary is devoted to convincing the Court that the limitations law of the forum applies.

A comment on the *Cope* and *Helmers* cases in 60 Har. L. R. 303 does criticize the former, for no convincing reason. The author suggests that a more reasonable result has been reached in cases applying the borrowing statutes to suits under the federal antitrust laws and holding that a cause of action originates in the particular state where the principal operative facts of the harm occurred. One of the reasons the result in the federal antitrust cases is reasonable is the fact that the person damaged has an opportunity of seeking redress either at the place he suffers those damages or where the tort feasor resides. That situation does not obtain here. Petitioner was required by federal law to sue Respondents in Ohio. Had he been able to sue them in Kentucky, they would have been defendants in *Anderson* v. *Abbott*.

## CONCLUSION

It must be conceded that the claim upon which suit was brought arose under and by virtue of the laws of the United States. Respondents' obligation matured to an enforcible right upon the quasi-judicial determination of an officer of the United States.

The "laws" of the United States did not "limit the time" for commencing suit to a lesser number of years than that provided by the Ohio general statute of limitations, so only the latter controls. The conditional "if" of the borrowing statute has not been met because the laws of Kentucky had nothing whatever to do with the arising of the cause. If federal statutes prescribed a shorter period of limitations, applicable to statutory claims generally, the procedural law of the forum would appropriately borrow such period. But there is no justification for the adoption of the procedural law of a third jurisdiction, Kentucky, which is neither the forum nor the political entity whose laws caused the action to arise.

Respondents assert that the cause of action arose in Kentucky because they were legally bound to regard the assessment as payable there. The National Bank Act fixes no place for payment. The Comptroller made no attempt to fix a place for payment. The original Receiver did not even invite Banco shareholders to pay any amount, at any time, or at any place. He merely advised them that satisfaction would be sought from them for whatever amount Banco did not pay.

Petitioner's cause of action is the aggregate of the facts necessary to establish his right to recovery under federal law. But for the lapse of time from February 20th to April 1st, that aggregate of facts had taken place when the assessment was ordered. Respondents' only connection with these facts was their acquisition of holding company stock. There-

after, the only conduct on their part which could have affected the cause of action would have been their parting with that stock before the bank closed.

Petitioner's cause of action had arisen when the assessment was levied. Postponing his right to sue added nothing to what had already occurred. Had the Comptroller not restrained the right of action, it could not be denied that the Receiver was possessed of both a completed cause of action and a presently enforcible right of action as of the moment the assessment was ordered. Such grace periods are not something to which shareholders are entitled as a matter of right. The Comptroller's concession in this regard could hardly have the effect of changing a cause of action in which the process of "arising" was then ended.

Respondents' motion to dismiss is based upon the assumption that the cause of action asserted here is not that alleged in the bill of complaint, but an action for breach of a legal obligation arising in Louisville, Kentucky, because of their failure to pay there.

It is respectively submitted that the judgment below should be reversed.

Respectfully submitted,

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No. 656

# Supreme Court of the United States

October Term, 1946

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A. M. ANDERSON, Receiver of the National Bank of Kentucky, Louisville, Kentucky,

*Petitioner,*

v.

LAWRENCE S. HELMERS, et al.,

*Respondents.*

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

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---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### STATEMENT

In the petition for the writ, there are some statements which are not accurate or which require supplement or explanation. For example, the District Court filed a "Memorandum and Decision" (R. 23-25) which decided only (R. 24 bot.) that the defense of the statute of limitations was properly raised by motions to dismiss and gave no reason for not sustaining the motions on that ground. The reason ascribed in the petition (p. 3) for the holding in the District Court is, therefore, pure surmise.

The opinion of the Sixth Circuit is not, as stated in the petition (p. 2),

> ". . . in direct conflict with the decision of . . . the Third Circuit on the same matter. . . ."

That it is not "on the same matter" will be shown later in this brief.

This action was not, as stated (p. 8),

> ". . . stayed pending the decision of this Court in *Anderson v. Abbott*,"

but the long delay resulted because

> "Action in this case was suspended until that litigation, on the issues other than Statute of Limitations, could be finally disposed of. . . ."

by this Court [156 F. (2d) at 49; R. 5].

The statement (p. 9 bot.) that defendants

> ". . . were not stockholders in . . a Kentucky bank . . ."

is true only if, by it, is meant a Kentucky state bank. But the National Bank of Kentucky was essentially a Kentucky institution. The Stipulation as to Facts (R. 26), not mentioned by petitioner, shows both that the organization certificate of the National Bank of Kentucky localizes it in the City of Louisville and (par. 2) its

> ". . . business . . . was . . . actually carried on and transacted in Louisville . . . Kentucky, and in no other place."

There was no such stipulation in the Third Circuit case. The importance of this difference in the two cases will be shown later.

Again, the petition fails to state some of the material allegations in the bill of complaint which, on motion to dismiss, are conclusively accepted as correct and which enter to an important extent into the decision. Thus, after reciting in paragraph VI of the bill (R. 5) that the Comptroller levied

". . . an assessment and requisition upon the shareholders of said The National Bank of Kentucky for $4,000,000.00, to be paid by them on or before the First day of April, 1931, and did make demand upon each and every one of them for the par value of each and every share of the capital stock of said association held or owned by them respectively, at the time of its failure; and said Comptroller of the Currency did thereupon direct the Receiver of the National Bank of Kentucky to take all necessary proceedings by suit or otherwise to enforce the individual liability of said shareholders."

the bill further alleges in paragraph XVII (R. 15):

"By reason of the foregoing, the defendants . . . have promised to pay said assessment . . . and each of the defendants appearing to be stockholders of the Banco-Kentucky Company is liable for the payment of the assessment levied by the Comptroller . . . hereinbefore referred to. . . ."

and contains a paragraph XVIII (R. 15), which begins:

"Acting pursuant to the authority and direction of the Comptroller of the Currency, the Receiver of the National Bank of Kentucky, on or about March 20th, 1931, sent and served upon each of the defendants and all the other shareholders of the BancoKentucky Company, the following assessment notice:"

followed (R. 16) by the assessment notice in full. This assessment notice, it will be observed, is headed:

"Office of the Receiver
THE NATIONAL BANK OF KENTUCKY
Louisville, Kentucky

Louisville, Ky., March 20, 1931"

and recites that the Comptroller:

". . . levied an assessment upon the stockholders of The National Bank of Kentucky, Louisville, Ky., on the

par value of each and every share, *payable at the Office of the Receiver, on or before April 1, 1931.*" (Emphasis ours)

Paragraph XVIII further continues (R. 16 bot.):

"Enclosed therewith and attached thereto was a copy of the order of assessment upon shareholders made by the Comptroller of the Currency of the United States hereinabove described."

By the Stipulation as to Facts, the "assessment and requisition of the Comptroller" was made Exhibit 1 (R. 27) and the notice referred to in paragraph VIII, Exhibit 2 (R. 29), and it was stipulated that these matters should be considered by the Court on hearing of the motions to dismiss with the same effect as if such facts had been alleged in the complaint (R. 27).

The Receiver petitioner, therefore, is confronted with a conclusive record that when the Receiver enclosed the assessment requisition and demand for payment of the Comptroller, including the Comptroller's authorization for the Receiver to take

". . . all necessary proceedings . . . to enforce the individual liability of said shareholders, . . ."

and the Receiver sent the assessment notice from his office in Louisville making the assessment

". . . payable at the Office of the Receiver, . . ."

the Receiver was:

"XVIII. Acting pursuant to the authority and direction of the Comptroller. . . ."

## ARGUMENT

### I. The Supposed Conflict Involves Only Questions of the Proper Interpretation of Different State Statutes of Limitations.

The petitioner refers (pp. 6 bot., 9 top) to "an important question of federal law." But this case involves only the construction and application of a state statute of limitations. This is also true of the Third Circuit decision, *Anderson* v. *Andrews, et al.*, 156 F. (2d) 972, which petitioner asserts is in conflict. Both the Court of Appeals for the Sixth Circuit and for the Third Circuit held, in accordance with the decisions of this Court [*Fisher* v. *Whiton*, 317 U. S. 217 (1942); *Rawlings* v. *Ray*, 312 U. S. 96 (1941); *Pufahl* v. *Est. of Parks*, 299 U. S. 217 (1936); *McClaine* v. *Rankin*, 197 U. S. 154 (1905); *McDonald* v. *Thompson*, 184 U. S. 71 (1902)], the actions before them were governed by the limitations of the state in which the suit had been brought. The Sixth Circuit opinion states:

> "It is conceded by the parties herein that the Federal statutes provide no period of limitation for actions to enforce liability of national bank stockholders, and accordingly the statute of limitations of the state in which the action is brought is applicable. *Rawlings* v. *Ray*, 312 U. S. 96." [156 F. (2d) at 49; R. 5-6.]

The Third Circuit opinion states:

> "There is no federal statute of limitations limiting the time in which shareholders' liability in a national bank may be enforced. The local law of limitations, therefore, is applicable." [156 F. (2d) at 973.]

Each court, having thus disposed of the preliminary question (as to which there is no dispute), then proceeded to determine whether the action before it was barred by the local statute of limitations. The Sixth Circuit described

this issue as "the narrow question 'where the cause of action arose' as the words are used in the Ohio Borrowing Statute" (R. 7) and held the Ohio action was outlawed by the Ohio statute of limitations. The Third Circuit Court held the Pennsylvania action was not barred by the Pennsylvania statute of limitations. Thus, if there is any conflict, it is merely a conflict on questions of state law in different states. It amounts to nothing more than that the Sixth Circuit Court has applied an Ohio statute differently from the way in which the Third Circuit has applied a similar but by no means identical Pennsylvania statute. No federal question of any kind is involved in the alleged conflict. Nowhere does petitioner assert that the decision of the Sixth Circuit Court of Appeals is not in conformity with Ohio law.

Since *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 (1937), a conflict in Circuit Court of Appeals decisions on questions of state law has not been regarded as a reason for granting certiorari. In *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202 (1937), it is stated (p. 206):

> "Rule 38 (5) of the Supreme Court Rules indicates that this Court will consider, as a reason for granting a writ of certiorari, the fact that 'a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter.' . . . As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' No such showing was attempted by the petition. Nor was it contended that the decision below was 'probably untenable' and therefore

probably in conflict with the state law as yet unannounced by the highest court of the State."

In the Third Circuit case Judge Goodrich observes

"'. . . that the Pennsylvania borrowing statute provides a defense to an action 'brought in any of the courts of this Commonwealth.'" [Footnote 9, 156 F. (2d) at 974.]

and suggests that perhaps the borrowing statute is not, therefore, applicable to the United States District Court sitting in Pennsylvania, but makes nothing of the point. However, it was decided in *David Lupton's Sons* v. *Automobile Club*, 225 U. S. 489, that if a state statute merely prohibits a non-complying foreign corporation from maintaining an action in the courts of the state, such a prohibition does not prevent suit in the federal courts. The language quoted does not appear in the Ohio statute of limitations and it is possible that the two Circuits, although reaching opposite conclusions with respect to liability, both decided correctly, the one interpreting the Pennsylvania statute of limitations, the other the Ohio.

## II. The Instant Case Was Heard on Facts Not Shown or Necessarily Implied in the Third Circuit Case.

The Third Circuit case was heard solely upon the complaint and a motion to dismiss. The instant case was heard on a stipulation of facts, previously mentioned, as well as on the pleadings (R. 26). The stipulation brought into the case the following facts which do not appear in the complaint:

"1. The organization certificate of The National Bank of Kentucky states that the place where its operations of discount and deposit are to be carried on is the City of Louisville, Jefferson County, State of Kentucky.

"2. The business of The National Bank of Kentucky was at all times actually carried on and transacted in Louisville, Jefferson County, Kentucky and in no other place.

* * * * * *

"It is further stipulated and agreed that the foregoing facts may be considered by the court on hearing of the various motions to dismiss with the same effect as if such facts were alleged in the complaint." (R. 26, 27.)

Clearly, these facts are of significance in determining where the cause of action arose. They are referred to in the Sixth Circuit opinion [156 F. (2d) at 51; R. 10] and are a basis for it. These facts could not have been considered by the Third Circuit, for they do not appear in the complaint.

Moreover, in the Sixth Circuit it was shown and argued that a national bank, although organized under federal law, is a highly localized institution. Not only is its business restricted to the city specified in the organization certificate, but its place of business may be changed only with the consent of the Comptroller, and then only in the same state. 12 U. S. C. Sec. 30. The requisite amount of capital with which a national bank may commence business is determined by the population of such city. 12 U. S. C. Sec. 51. Its list of shareholders, open to the inspection of all creditors, must be kept in the office where its business is transacted. 12 U. S. C. Sec. 62. Three-fourths of its directors must reside in the state where it is located and must continue to reside there. 12 U. S. C. Sec. 72. It may consolidate only with such other national or state banks as are located within the same state. 12 U. S. C. Sec. 33, 34(a). A national bank may, under certain circumstances, operate branches but such branches must be within the state where the national bank is located. 12 U. S. C. Sec. 36.

Consequently, it has been frequently held that a national bank is a resident of and is domiciled in the state where it is located. *In re Standard Oak Veneer Co.*, 173 Fed. 103 (D. C. Tenn. 1909); *Schmitt* v. *Tobin*, 15 Fed. Supp. 35 (D. C. Nev. 1935.)

Significantly the very first allegation of the complaint is that the National Bank of Kentucky is:

> "... *domiciled* at Louisville, Jefferson County, in the Western District of Kentucky" (R. 1).

By an express statutory provision a national bank is, for jurisdictional purposes a "citizen" of the state in which it is located. 28 U. S. C. Sec. 41 (16). It may be sued only in the district in the state where it is located, 12 U. S. C. Sec. 94; *Leonardi* v. *Chase National Bank* (2nd Cir. 1936), 81 Fed. (2d) 19, certiorari denied, 298 U. S. 677.

It is apparent, therefore, that all the operative facts that gave rise to this assessment occurred in Kentucky and in no other place. The bank was located and domiciled in Louisville, Kentucky; its business operations were carried on exclusively there, and the insolvency itself occurred there. There is no stipulation in the Third Circuit, as in the present record, that the entire business of the National Bank was transacted in Louisville and in no other place. We venture to assert that the decision sought to be reviewed is correct in holding the obligation is due at the place where the obligation should be met and that the cause of action arises where the breach occurs, i. e., where the obligation is not met.

## III. The Decision of the Sixth Circuit Court of Appeals Is in Accord with Applicable Decisions of This Court.

(a) Petitioner urges that "the decision of the Sixth Circuit holding that the cause of action was contractual in character" is in conflict with applicable decisions of this

Court (Pet. 8, 9). There is not even a suggestion in the Circuit Court's opinion, however, that it considered the liability contractual or that such a view formed a basis for its decision. On the contrary, the Court of Appeals expressly stated:

> "It is also agreed that the complaint sets forth an action 'upon a liability created by statute.'" [156 F. (2d) at 49 bot.]

Actually this Court has frequently held that the double liability of national bank stockholders is "quasi-contractual in its origin and basis." See *Brown* v. *O'Keefe*, 300 U. S. 598 at 606 (1936), and cases cited therein. The liability is so far contractual that it has been held to be dischargeable in bankruptcy as a liability upon an "implied contract." *Brown* v. *O'Keefe*, supra.

(b) The decision of the Court of Appeals is not in the slightest inconsistent as petitioner suggests it is with *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946). The *Holmberg* case involved stockholders' liability under the Federal Farm Loan Act (39 Stat. 360, 374, 12 U. S. C. Sec. 812). The only remedy provided by that Act for enforcement of the liability is a creditors' suit in equity in which the Court must first determine the existence and extent of insolvency, and the amount of shareholders' liability. This Court held that in such an action the federal courts were not bound by the state statute of limitations because the action involved "not only a federally-created right but a federal right for which the *sole* remedy is in equity." (Emphasis ours.)

Under the National Bank Act, the existence of insolvency and the amount of shareholders' liability is determined administratively by the Comptroller of the Currency (12 U. S. C. Secs. 191 and 192). The receiver may then bring an action at law against shareholders on the Comptroller's

assessment. *Russell* v. *Todd*, 309 U. S. 280 at 286. In the case of a "full" or 100% assessment, such as is involved here (R. 5), it has frequently been held that the receiver's action *must* be at law. *Kennedy* v. *Gibson*, 8 Wall. 498 (1869); *Casey* v. *Galli*, 94 U. S. 673 (1876); *Hale* v. *Allinson*, 188 U. S. 56 (1902); *Church* v. *Hubbard, et al.*, 91 F. (2d) 406 (C. C. A. 6, 1937); *Aufdenkamp* v. *L'Herrison*, 56 F. (2d) 344 (C. C. A. 9, 1932). When, as in the case at bar, the receiver elects to proceed in equity in order to obtain a more convenient remedy and to avoid a multiplicity of suits, the jurisdiction of law and equity is "concurrent," and "equity will withhold its remedy if the legal right is barred by the local statute of limitations." *Russell* v. *Todd*, supra at 289; *Godden* v. *Kimmel*, 99 U. S. 201; *Overfield* v. *Pennroad Corp.*, 146 F. (2d) 889 (C. C. A. 3, 1944; *Bailey* v. *Tillinghast*, 99 Fed. 801 (C. C. A. 6, 1900).

The distinction between a creditor's suit in equity against stockholders of a joint stock land bank and a receiver's suit against stockholders of a national bank is clearly set forth by the late Chief Justice Stone in *Russell* v. *Todd*, supra, at 286, 290-291. See also *Christopher* v. *Brusselback*, 302 U. S. 500 (1937). The limitation rules applicable to these two classes of suits are entirely different. It has never been questioned by this Court that state statutes of limitations are applicable to actions in the federal courts to collect national bank assessments. See cases cited *supra*, p. 5.

In the *Andrews* case the Third Circuit did not purport to follow the *Holmberg* case, but merely cited it as indicating an "approach" to the question where the cause of action arose within the meaning of the Pennsylvania Borrowing Statute. The language of the opinion of this Court in the *Holmberg* case, quoted by Judge Goodrich (p. 975) refers to

> ". . . enforcing an equitable right created by Congress."

The right to sue on a national bank assessment is to sue at law for a debt, if desired. The right to sue in equity is not created by Congress, but arises from ordinary equitable principles.

(c) The law is now settled by decisions of this Court that a cause of action to recover a national bank stock assessment arises at the *time* the assessment is payable. *Rawlings* v. *Ray*, supra. The decision of the Sixth Circuit conforms to this principle and holds also that the cause of action arises at the *place where* the assessment is payable and where all the operative facts which give rise to the cause of action, including the insolvency of the bank, occur.

## IV. The Decision of the Court of Appeals Is in Conformity with the Law of Ohio, Federal Decisions and General Law.

Petitioner urges that the cause of action could not have arisen in Kentucky within the meaning of the Ohio statute because the respondents "never resided in Kentucky" and that it is

> ". . . anomalous to say that the cause of action arose in Kentucky where defendants have never been and where no action against them could be brought."

However, respondents' residence affected only venue, an entirely different matter from where the cause of action arose. The Supreme Court of Ohio in *Payne* v. *Kirchwehm*, 141 O. S. 384, app. dis. 320 U. S. 706 (1934), and the federal courts and courts of last resort of numerous states have held that the defendant's residence has no bearing on the place where the cause of action arose. In *Anglo-American Land M. & A. Co.* v. *Lombard*, 132 Fed. 721 (C. C. A. 8, 1904), Mr. Justice (then Circuit Judge) VanDevanter stated:

"The place where a cause of action arises is not determined by inquiring where it may be enforced. The two things are not the same. The right of action must arise, come into being, before it can be enforced anywhere, and when it has arisen the action for its enforcement, unless purely local, may be maintained in any state." (132 Fed. at 750.)

See, to the same effect, *Klotz* v. *Angle*, 220 N. Y. 347, 116 N. E. 24 (1917); *McKee* v. *Dodd*, 152 Cal. 637, 93 Pac. 854 (1908); *West* v. *Theis*, 15 Idaho 167, 96 Pac. 932 (1908).

In the present case, if the Receiver could not get service on the defendants in Kentucky, his counsel could have crossed the bridge over the Ohio River to Cincinnati any day after April 1, 1931, instead of waiting to do so until more than five years later, December 12, 1936.

## V. The Question Involved in This Case Is Unlikely to Recur.

Since the institution of this action, double liability of national bank shareholders has been virtually eliminated. Such liability does not apply with respect to any shares issued after June 16, 1933 [48 Stat. 189, 12 U. S. C. Sec. 64(a)], and Section 304 of the Banking Act of 1935 permits all national banks to terminate liability on outstanding shares merely by the publication of a notice [49 Stat. 708, 12 U. S. C. Sec. 64(a)]. Although there is no record of the national banks that have availed themselves of this exemption, it is reasonable to suppose that, in the more than ten years intervening, all, save an insignificant number, have done so.

## VI. The Litigation Should Come to an End.

The Louisville case which resulted in *Anderson* v. *Abbott*, 321 U. S. 349, did not involve, as does this case, any statute of limitations. The present suit was brought long

after the Louisville case was filed, and after the cause of action had become stale in Kentucky where it arose. Ohio G. C. Sec. 11234 was enacted for the purpose of protecting Ohio residents from harassment on outlawed claims. The decision sought to be reviewed properly applied Sec. 11234 to carry out this purpose. The Ohio decisions are that statutes of limitations are statutes of repose and are to be favorably applied. *Townsend* v. *Eichelberger*, 51 O. S. 213, 216 (1894).

This suit has now been pending just about ten years, and it is more than fifteen years since April 1, 1931. From the judgment entry (R. 30-31) and the record, it is apparent that there are numerous defendants, many holding comparatively small amounts of stock. In fifteen years, the interest at six per cent has almost equalled the amount of the assessment. The decision sought to be reviewed is correct and in accordance with decisions of this Court: the assessment and notice could have been sued on at law, as in debt, and the suit happens to be in equity as a concurrent remedy. The suit does not involve a right created by Congress cognizable only in equity. The maxim, *debet esse finis litium*, seems applicable and the petition should be denied.

Respectfully submitted,

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No. 256

IN THE

# Supreme Court of the United States

October Term, 1946

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A. M. ANDERSON, Receiver of the National Bank of Kentucky, Louisville, Kentucky,

*Petitioner,*

v.

LAWRENCE S. HELMERS, ET AL.,

*Respondents.*

---

## BRIEF FOR RESPONDENTS

---

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No. 656

IN THE

# Supreme Court of the United States

October Term, 1946

---

A. M. ANDERSON, Receiver of the National Bank of Kentucky, Louisville, Kentucky,

*Petitioner,*

v.

LAWRENCE S. HELMERS, ET AL.,

*Respondents.*

---

## BRIEF FOR RESPONDENTS

---

### THE ISSUE

Petitioner concedes that the statute of limitations of Ohio is applicable (Pet. Br. 4). He concedes, moreover, that if the cause of action arose in Kentucky, the action is barred by the Ohio Borrowing Act (Section 11234 of the Ohio General Code). The question before the Court, therefore, is confined to the narrow issue—Did the cause of action arise in Kentucky within the meaning of the Ohio Borrowing Act?

The Circuit Court of Appeals for the Sixth Circuit held the cause of action arose in Kentucky and was barred by limitations (R. 2, et seq.). The Court held it arose there

because the assessment was payable in that State and because the facts that ripened the statutory liability into a cause of action occurred in that State. The Court's decision is in accordance with the long established construction of Section 11234 and of similar borrowing acts of other States. Its decision that the cause of action arose at the *place* the assessment was payable conforms, moreover, with the principles recently enunciated in *Rawlings* v. *Ray*, 312 U. S. 96 and *Fisher* v. *Whiton*, 317 U. S. 217, that the cause of action arises at the *time* the assessment is payable.

## FACTS OMITTED FROM PETITIONER'S BRIEF

Several vitally important facts alleged in the complaint or stipulated by the parties are omitted from the statement of the case in Petitioner's brief and are ignored in the argument.

1. On March 20, 1931 the Receiver sent to each of the defendants an "assessment notice," reading in part as follows (R. 15-16):[1]

> "OFFICE OF THE RECEIVER
> THE NATIONAL BANK OF KENTUCKY
> LOUISVILLE, KENTUCKY
>
> Louisville, Ky., March 20, 1931
>
> As a stockholder in The BancoKentucky Company, you will please take notice, that the Comptroller of the Currency has on February 20, 1931, levied an assessment upon the stockholders of The National Bank of Kentucky, Louisville, Ky., on the par value of each and every share, *payable at the Office of the Receiver*, on or before April 1, 1931."[2]

[1] Pages of that part of Record showing proceedings in District Court and the part showing proceedings in Court of Appeals are both numbered from Page 1.

[2] Emphasis throughout this brief is ours.

In sending this notice, the complaint alleges, the Receiver was "acting pursuant to the authority and direction of the Comptroller of the Currency" (R. 15). In view of this allegation, which must be taken as true on motion to dismiss, the Receiver cannot properly argue that he was "not authorized by the Comptroller . . . to designate or to fix a place for payment" (Pet. Br. 11).

2. Attached to the notice was a copy of the order of assessment made by the Comptroller (R. 16). This order of assessment is Exhibit 1 (R. 27). A vital paragraph of this assessment is:

> "NOW, THEREFORE, by virtue of the authority vested in me by law, I do hereby make an assessment and *requisition* upon the shareholders of the said 'The National Bank of Kentucky of Louisville,' for Four Million ($4,000,000) dollars, to be paid by them on or before the first day of April 1931, and I hereby make *demand* upon each and every one of them for the par value of each and every share of the capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct Paul C. Keyes, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders" (R. 28).

The Receiver now argues his notice was not a "demand" for payment (Pet. Br. 12), though the attached assessment makes *demand*. Furthermore, "requisition" means "an authoritative demand" *Webster's New International Dictionary* (1931). In *McDonald* v. *Thompson*, 184 U. S. 71, 76, an exactly similar procedure in similar language was held to be a demand for payment.

3. It is stipulated that the organization certificate of The National Bank of Kentucky provides its operations are to be carried on in Louisville, Kentucky (R. 26). By express provision of the National Bank Act, it was pro-

hibited from transacting business in any other place. 12 U. S. C. Sec. 81. It is further stipulated that "the business of the National Bank of Kentucky was at all times actually carried on and transacted in Louisville, Jefferson County, Kentucky, *and in no other place*" (R. 26).

## SUMMARY OF RESPONDENTS' ARGUMENT

The Sixth Circuit decision that the action was barred by limitations is correct for the foliowing reasons:

1. The National Bank Act provides no period of limitations for actions to enforce the double liability of shareholders. Hence, the applicable period of limitations is to be determined by the law of Ohio, the state in which the action was brought.

*Rawlings* v. *Ray*, 312 U. S. 96;
*Pufahl* v. *Estate of Parks*, 299 U. S. 217;
*McClaine* v. *Rankin*, 197 U. S. 154;
*McDonald* v. *Thompson*, 184 U. S. 71.

Although the suit was brought in equity, the statutes of limitations of both Ohio and Kentucky apply to actions in equity as well as at law. *Bryant* v. *Swetland*, 48 O. S. 194 (1891); *Harris* v. *Sewell's Adm.*, 87 Ky. 63 (1888). Moreover, the cause of action is a legal one [*Hale* v. *Allison*, 188 U. S. 56; *Church* v. *Hubbard* (6th Cir. 1937), 91 F. (2d) 406], for which equity affords a concurrent remedy in aid of the legal right to avoid a multiplicity of suits. *Bailey* v. *Tillinghast* (6th Cir. 1900), 99 Fed. 801; *Anderson* v. *Abbott* (D. C. Ky. 1938), 23 F. Supp. 265, 268. In such a case the Federal courts sitting in equity are bound by the state statute of limitations under the familiar principle recently reiterated in *Russell* v. *Todd*, 309 U. S. 280 at 289 that

> "when the jurisdiction of the federal court is concurrent with that at law, or the suit is brought in aid

of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations."

Thus, in *McDonald* v. *Thompson, supra,* a receiver's action in equity to enforce a double liability assessment against the transferor of stock was held barred by limitations.

2. Section 11234 of the General Code of Ohio "borrows" the period of limitations for like causes of action of the state "where the cause of action arose," if that period is shorter than the Ohio period.

*Payne* v. *Kirchwehm*, 141 O. S. 384 (1943), app. dis. 320 U. S. 706;

*B. & O. R. R. Co.* v. *Reed* (6th Cir., 1915), 223 Fed. 689, certiorari denied, 239 U. S. 640;

*Auglaize Box Board Co.* v. *Kansas City Fibre Box Co.* (6th Cir., 1929), 35 F. (2d) 822, certiorari denied, 281 U. S. 730;

*Hilliard* v. *Pa. R. R. Co.* (6th Cir., 1934), 73 F. (2d) 473, certiorari denied, 294 U. S. 721.

3. The cause of action arose in Kentucky because;

(a) the assessment was payable in Kentucky and that state was, therefore, the place of performance of the obligation sued on, and

(b) all the operative facts that gave rise to the cause of action, including insolvency of the national bank, occurred in Kentucky, where the bank was located and domiciled and where it transacted all its business.[2]

---

[2] The only circumstance that did not occur in Kentucky was the Comptroller's action in making the order of assessment. This occurred at the Comptroller's office in the District of Columbia (R. 27). If the cause of action were deemed to have arisen in the District of Columbia, the action is nevertheless barred, because the applicable period of limitations in the District of Columbia is three years. District of Columbia Code (1929), Title 24, Sec. 341; *Strasburger* v. *Schram* (Ct. App. D. C. 1937), 93 F. (2d) 246. The District of Columbia is a state within the meaning of statutes such as Section 11234. *Talbott* v. *Silver Bow County*, 139 U. S. 438, 444-445; *McLaughlin* v. *Poucher*, 127 Conn. 441 (1941). This alternative contention was suggested by us in the Court of Appeals but was not passed upon by that Court.

4. The period of limitations provided by Kentucky law for an action such as this is five years. Sec. 413.120 Ky. Rev. Stat. (1944); *Aldrich* v. *Yates* (C. C. Ky. 1899), 95 Fed. 78. This is shorter than the period provided by Sec. 11222 of the General Code of Ohio for actions upon a liability created by statute, which is six years. Hence this action is subject to a five year period of limitations by reason of Section 11234 of the General Code of Ohio.[4]

5. The action was commenced December 12, 1936, more than five years after it accrued. The assessment was levied February 20, 1931 (R. 4, 5). It was payable at the office of the Receiver in Louisville, Kentucky, on April 1, 1931 (R. 4, 5, 16). The action was, therefore, barred at the very latest on April 2, 1936. *Rawlings* v. *Ray*, 312 U. S. 96. Since the action was not brought until nine months thereafter, it is barred by virtue of Section 11234.

## MISCONCEPTIONS INVOLVED IN PETITIONER'S ARGUMENT

Petitioner's argument is based on four misconceptions of law:

1. *Petitioner's Confusion of "Liability" with "Cause of Action"*— Throughout his brief petitioner confuses "liability" with "cause of action." Thus he contends:

> "Since the laws of the country creating petitioner's *cause of action* provided no period of limitations to be borrowed, it is subject only to the general limitation of the forum" (Pet. Br. 8-9).

But the federal statute created only the *liability*. It did not create the *cause of action*, any more than the execution of a note creates a cause of action before default in payment or the issuance of an insurance policy creates

[4] Since the defendants were all residents of Ohio, the Kentucky statute of limitations would not have been tolled during their absence from Kentucky. *Daly* v. *Power*, 248 Ky. 533 (1933).

a cause of action before occurrence of a loss. Petitioner's cause of action, like every cause of action, arose as a result of *facts*,—all of which occurred in Kentucky.

The distinction between "liability" and "cause of action" is clearly developed in the lower court's opinion (R. 8).

The distinction is important in this case because of the provisions of the Ohio Borrowing Act. It does not borrow, as Petitioner seems to assume, the limitations of the jurisdiction whose laws created the liability. As far as that statute is concerned, it is immaterial under what law the liability was created or whether it was created by law or by contract. The statute borrows only the applicable period of limitations of the state "where the cause of action arose."

2. *Petitioner's Contention That the Assessment Fully Matured the Cause of Action*—Petitioner's entire argument that the cause of action did not arise in Kentucky is based on a *dictum* in *Pufahl* v. *Parks*, 299 U. S. 217, 223, that the Comptroller's assessment fully matured the cause of action (Pet. Br. 5, 6). This dictum was expressly limited by the later decisions of *Rawlings* v. *Ray*, 312 U. S. 96 and *Fisher* v. *Whiton*, 317 U. S. 217. In both cases this Court held that where the Comptroller fixes a time for payment, there is not "a complete and present cause of action" until the time so fixed for payment. Hence not merely the assessment but failure to pay the assessment is necessary to ripen the liability into a cause of action.

3. *Petitioner's Contention That Non-Payment Is Not Part of the Cause of Action*—Petitioner argues it is immaterial that the assessment was payable in Kentucky, asserting that non-payment is not part of the cause of action (Pet. Br. 13-14). But, in an action on an obligation for the payment of money, non-payment is universally held to be an essential part of the cause of action that must be

alleged in the complaint. 48 *C. J.* 665, Sec. 129. This is true even in those jurisdictions where, as a rule of pleading, payment must be pleaded as an affirmative defense. See, for example, *Lent* v. *N. Y. & M. R. Co.*, 130 N. Y. 504, 510 (1892):

> "It does not admit of controversy that upon an ordinary contract for the payment of money, *non-payment is a fact which constitutes the breach of the contract and is the essence of the cause of action*, and being such within the rule of the Code it should be alleged in the complaint."

After pointing out that the rule that payment is also an affirmative defense had its origin in the peculiarities of common law pleading but has been followed under the Codes so that the plaintiff might be apprised of the precise nature of the defense, the court says:

> "But there is no need to further extend the rule, and hold that, because payment as a defense must be pleaded, the breach of the agreement need not be alleged in the complaint. That would have the contrary effect and lead to embarrassments that are avoided when the plain provisions of the Code are followed." (Id. at p. 511)

The complaint alleges that the pro rata amount of the assessment is "*due* from each stockholder" (R. 19). This is equivalent to an allegation of non-payment, as otherwise the assessment would not be "due." 8 *Am. Jur.* 565, Sec. 957.

4. *Petitioner's contention that the United States is a "country" within the meaning of the Ohio Borrowing Act.* Petitioner urges that the word "country" in Section 11234 includes the United States. From this he argues that the cause of action arose in the "country of the United States" and not in Kentucky (Pet. Br. 7).

It is inconceivable that a cause of action can arise in the United States and not in one of the states of the United States. The United States is a "union of states." *Texas v. White*, 74 U. S. (7 Wall.) 700 at 721. Kentucky is one of the states of the Union. Consequently, even if we assume that the United States is a country within Section 11234 and that the cause of action arose there, it does not follow that the cause of action did not also arise in Kentucky. The Ohio statute borrows the limitations of "*any* state or country where the cause of action arose."

With respect to Petitioner's argument, the Court of Appeals stated (R. 12):

> "*If the critical act occurred within the geographical limits of the United States it necessarily occurred within the geographical limits of one of the 48 states or the District of Columbia.* In this case the liability is created by a law of the United States, rather than by the law of Kentucky or of any other state, but the cause of action arose through a combination of that law and the failure to perform the duty imposed by that law. The failure to perform the required duty occurred in Kentucky, not in the United States generally without occurring in any of the subdivisions thereof."

In international law, the United States is regarded as a political entity with geographical location and boundaries, but in domestic law the United States is "the collective name of the states which are united by and under the Constitution." *Hooven & Allison Co. v. Evatt*, 324 U. S. 652 at 672. *Langdell, "The Status of our New Territories,"* 12 Harv. L. Rev. 365, 371.

Irrespective of its political status, it is apparent that the United States is not a "country" within the meaning of Section 11234, and that that word was intended to refer

to a foreign country. There has never been a general federal statute of limitations for civil actions, and as to any liability arising under a federal statute providing its own period of limitations, such period would control regardless of state law. *Herget* v. *Central Nat. Bank & Trust Co.*, 324 U. S. 4. Consequently, there never has been a federal period of limitations that the Ohio statute could have borrowed. It should not be assumed that in using the word "country" in Section 11234 the Ohio Legislature was doing a vain thing. In *H. O. L. C.* v. *Caplan*, 236 Mo. App. 1276 (1942), a Missouri statute requiring the qualification of corporations organized under the laws of "any other state, territory or country," was held not to apply to a corporation organized under the laws of the United States but only to one incorporated under the laws of another state or a "foreign country."

**A CAUSE OF ACTION ARISES AT THE PLACE WHERE THE OPERATIVE FACTS OCCUR. IN THE CASE OF AN OBLIGATION TO PAY MONEY, IT ARISES AT THE PLACE FIXED FOR PAYMENT.**

The Ohio Borrowing Act and similar statutes of other states have been in effect for almost a century, and the phrase "where the cause of action arose" has acquired a well recognized meaning. In general, a cause of action is held to arise at the place where the operative facts constituting the cause of action occur. Where the obligation is solely for the payment of money, the cause of action is held to arise at the place fixed for payment—nonpayment being the operative fact that finally matures the cause of action.

In *West* v. *Theis*, 15 Idaho 167 (1908), the Court, after reviewing authorities from numerous states, concluded:

> "Section 4079, referring to 'a cause of action that has arisen in another state' has reference to the state

or jurisdiction in which the contract or obligation was to be performed or discharged. . . ."

The Court of Appeals for the Sixth Circuit followed this rule. It held (R. 7, 8):

> "A cause of action 'is the fact or combination of facts which gives rise to a right of action, the existence of which affords a party a right to judicial interference in his behalf.' *B. & O. R. R. Co.* v. *Larwill,* 83 O. S. 108, 115-116. See *Oman* v. *Delius,* 162 Tenn. 192, 199-200; *Maryland Casualty Co.* v. *Gerlaske,* 68 Fed. (2d) 497, 499 (C. C. A. 5th). The place where a cause of action arises is the place where the operative facts that give rise to the action occur. Although it may be necessary that a number of separate facts exist in order to create a cause of action, yet it is the happening of the last of such facts which brings the cause of action into existence. Such an act, or the failure to act where there is a duty to do so, is the critical event which transforms a potential liability into one presently enforcible. See *Brown* v. *O'Keefe,* 300 U. S. 598, 603."

It has sometimes been urged that a cause of action can only arise in the state where the defendant may be sued. But, as to transitory actions, this view has been rejected by the Supreme Court of Ohio, the Federal courts and the courts of many other jurisdictions, which hold that the defendant's residence has no bearing on the place where the cause of action arises. *Payne* v. *Kirchwehm,* 141 O. S. 384 (1943), app. dis. 320 U. S. 706; *Anglo-American Land M. & A. Co.* v. *Lombard,* (8th Cir. 1904) 132 Fed. 721;[8]

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[8] In this case, Mr. Justice (then Circuit Judge) VanDevanter stated:

"The place where a cause of action arises is not determined by inquiring where it may be enforced. The two things are not the same. The right of action must arise, come into being, before it can be enforced anywhere, and when it has arisen the action for its enforcement, unless purely local, may be maintained in any state." (132 Fed. at 750).

*Klotz* v. *Angele*, 220 N. Y. 347 (1917); *McKee* v. *Dodd*, 152 Cal. 637 (1908); *West* v. *Theis*, *supra*.

In accordance with the foregoing rules, a cause of action for tort is usually held to arise in the place where the tortious acts were committed. *B. & O. R. R. Co.* v. *Reed* (6th Cir., 1915), 223 Fed. 689, certiorari denied, 239 U. S. 640; *Hilliard* v. *Pennsylvania R. Co.* (6th Cir., 1934), 73 Fed. (2d) 473, certiorari denied, 294 U. S. 721. A cause of action for breach of contract arises at the place where the breach occurred. *Auglaize Box Board Co.* v. *Kansas City Fibre Box Co.* (6th Cir., 1929), 35 F. (2d) 822, certiorari denied, 281 U. S. 730; *Pond Creek Mill & Elevator Co.* v. *Clark* (7th Cir., 1920), 270 Fed. 482; *Wester* v. *Casein Co. of America*, 206 N. Y. 506 (1912). If the obligation is solely for the payment of money, as in the case of a promissory note, the cause of action arises at the place where payment should have been made. *Payne* v. *Kirchwehm*, *supra*; *Alropa Corp.* v. *Kirchwehm*, 138 O. S. 30 (1941); *Bowers* v. *Holabird*, 51 O. App. 413 (1935).

The recent decision of the Supreme Court of Ohio in *Payne* v. *Kirchwehm*, *supra*, is an excellent example of this principle. A suit was brought in Ohio on several notes executed and payable in Florida. The defendant was a resident of Ohio who had never resided in Florida and who was not in that state at the time the cause of action accrued or at any time thereafter. (See 141 O. S. at 394.) The Ohio period of limitations was fifteen years and the Florida period, five years. The court held that the cause of action arose in Florida where the notes were payable, notwithstanding that because of his absence from that state, defendant could not have been served there. Consequently the court held the Florida five year limitation applicable by reason of Sec. 11234 of the Ohio General Code and that the action was barred.

In *McKee* v. *Dodd*, 152 Cal. 637 (1908), the court stated:

"A cause of action, as Professor Pomeroy points out with his usual lucidity (Remedies and Remedial Rights, Sections 452 et seq.), arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty of the person on whom the duty rests. 'Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term and as it is used in the Codes of the several states.' It was the right of plaintiff to look for payment of his debt at the time it became due and at the place of payment,—New York state. *It was the duty of the deceased to pay the debt, not only when it became due, but at the place of payment,—New York state. His failure in this regard gave rise to the cause of action, and clearly, therefore, that cause of action arose in the state of New York.*"

See to the same effect:

*West* v. *Theis*, 15 Idaho 167 (1908);
*Swift* v. *Clay*, 127 Kan. 148 (1928);
*Chevrier* v. *Robert*, 6 Mont. 319 (1887);
*Klotz* v. *Angele*, 220 N. Y. 347 (1917);
*Balee* v. *Hidalgo County Water Improvement District*, 229 A. D. 660, 242 N. Y. S. 676 (1930);
*Lawson* v. *Tripp, et al.*, 34 Utah 28 (1908).

Petitioner suggests, without any supporting reason, that a different rule applies to causes of action upon a liability created by federal statute. But the cases hold otherwise. Thus, an action for treble damages under the Federal Anti-trust laws is held to arise in the state in which the illegal acts occurred. *Seaboard Terminals Corp.* v. *Standard Oil Co.* (2d Cir., 1939), 104 F. (2d) 659; *Bluefields S. S. Co.* v. *United Fruit Co.* (3d Cir., 1917), 243 Fed. 1; *Hansen Packing Co.* v. *Swift & Co.* (D. C. N. Y. 1939), 27 F. Supp. 364. A cause of action for overtime compensation and liquidated damages under the Fair Labor

Standards Act of 1938 is held to arise in the state where the work was performed. *Smith* v. *Continental Oil Co.* (D. C. N. Y., 1945), 59 F. Supp. 91.

In the District Court opinion in *Seaboard Terminals Corp.* v. *Standard Oil Co., supra,* Judge Patterson stated:

> "It is urged that a cause of action for treble damages under the national antitrust acts does not arise in any particular state. The fact is, however, that the cause of action does arise in the place or places where the impact of the defendants' conduct is felt by the plaintiffs, and if the law of the forum refers to the law of such place or places for the applicable limitations on actions, the law of that place or places becomes controlling" (24 F. Supp. 1018 at 1020-21).

## THIS CAUSE OF ACTION AROSE IN KENTUCKY

### (a) How the Cause of Action Arose.

That this cause of action arose in Louisville, Kentucky, is apparent from the manner in which a cause of action of this kind arises. *Liability* of national bank stockholders for the debts of the bank is provided by federal statute. 12 U. S. C. §§ 63, 64.* But the federal statute does not create the *cause of action.* The liability provided by statute is only "potential"; until the failure of the bank it is merely a "latent possibility." *Brown* v. *O'Keefe,* 300 U. S. 598, 603. It is only upon insolvency and liquidation that this potential liability becomes actual. In *Brown* v. *O'Keefe, supra,* the Court states:

> "Liquidation coupled with insolvency is the critical event which is capable of transforming a potential liability into one presently enforcible, as soon as a

* Since July 1, 1937, National Bank stockholders are not subject to double liability provided the bank has published a notice of termination of liability as required by statute. 12 U. S. C. Sec. 64(a).

qualified claimant appears upon the scene'' (300 U. S. at 603).

Before the Comptroller may direct the Receiver to enforce shareholders' liability, he must first find that the Bank is insolvent and that it is necessary to enforce the liability in order to pay its debts. 12 U. S. C. §§ 191, 192. This direction is customarily given by an order of assessment. Even then the liability has not ripened into a cause of action. If, as in the instant case, the order of assessment fixes a date for payment, the cause of action does not arise until and unless the shareholder fails to pay the assessment by the date fixed. Until then, no suit can be brought on the assessment. *Rawlings* v. *Ray, supra.* Should a shareholder pay the assessment before the payment date, no cause of action would arise against him.

The operative facts that gave rise to this cause of action, therefore, were (a) the insolvency of the Bank and (b) the failure to pay the assessment at the time and place fixed for its payment. Both occurred in Kentucky.

**(b) The Assessment Was Payable in Kentucky.**

The place of performance of the obligation sued on in this case was Louisville, Kentucky. It was there that the assessment was payable by express direction of the Receiver, given ''pursuant to the authority and direction of the Comptroller'' (R. 15, 16). Even in the absence of such a direction, the assessment would have been payable at the Receiver's office in Louisville under the familiar rule that where no place of payment is specified, it is the duty of the debtor to seek out the creditor and the obligation is payable at the creditor's place of business. 48 *C. J.* 592, 593; *Dockham* v. *Smith*, 113 Mass. 320 (1873). As a practical matter there was no place other than the Receiver's office at Louisville where the assessment could have been paid.

The rule is now well established that the cause of action arises at the *time* the assessment is payable. *Rawlings* v. *Ray* (1941), 312 U. S. 96. It arises at that time because it is then that it first becomes a "full and complete" cause of action. For the same reason the cause of action must also arise at the *place* the assessment is payable, for "the time when the cause of action arises determines, also, the place where it arises." See *Wester, et al.* v. *Casein Co. of America*, 206 N. Y. 506 (1912), where the court quoted from Cleasby, J., in *Durham* v. *Spence*, L. R. Vol. 6 (1870-71), page 52, as follows:

> "The cause of action must have reference to some time as well as some place. Does, then, the consideration of the time when the cause of action arises give us any assistance in determining the place where it arises? I think it does. The cause of action arises when that is not done which ought to have been done, or that is done which ought not to have been done. But the time when the cause of action arises determines, also, the place where it arises; for when that occurs which is the cause of action the place where it occurs is the place where the cause of action arises."

Insofar as concerns the place where the cause of action arose, the situation is the same as if each defendant had executed a note to The National Bank of Kentucky payable at Louisville on April 1, 1931. Had there been default on these notes, the resulting causes of action, whether enforced by the Bank or its Receiver, would have arisen at Louisville. See cases cited, *supra*, pp. 11-12. Although the liability here was created by statute rather than by contract, the distinction is immaterial in determining where the cause of action arose. In either case the obligation is solely for the payment of money at a fixed time and place. Moreover, the superadded liability of national bank stockholders, though created by statute, is contractual in both "its origin and basis." See *Brown* v. *O'Keefe*, 300 U. S. 598, 606-7.

Petitioner now attempts to repudiate both his assessment notice and the allegations of his complaint. His argument that because the order of assessment did not fix the place of payment he was not empowered to do so (Pet. Br. 11), lacks conviction in view of the positive allegation that the "assessment notice" was sent "pursuant to the authority and direction of the Comptroller" (R. 15). Irrespective of this, the Receiver had been clearly authorized by the Comptroller to fix the place for payment by the terms of the order of assessment, which directed him to "take all necessary proceedings, by suit or otherwise," to enforce the individual liabilities of the shareholders.

This Court has recently held that the Comptroller has the authority to fix the time for payment of an assessment (*Rawlings* v. *Ray, supra*) and to extend the time originally fixed (*Fisher* v. *Whiton, supra*). On the same principle, the Comptroller clearly has the power to fix the place of payment or to authorize the Receiver to do so. The Receiver is the agent of the Comptroller [*Oosterhuis* v. *Palmer* (2 Cir., 1943), 137 F. (2d) 322, 325] and his powers are to be liberally construed. *Wittnebel* v. *Loughman* (D. C. N. Y., 1935), 9 F. Supp. 465, aff'd 80 F. (2d) 222, certiorari denied, 297 U. S. 716.

The Petitioner further seeks to avoid the effect of his notice by characterizing it as a mere "warning" that he intended to look to the shareholders "for what he was unable to recover from the holding company" (Pet. Br. 12). But the obligation of the defendants was not secondary to that of the holding company. *Anderson* v. *Abbott*, 321 U. S. 349 at 357. Moreover, the Receiver claimed and recovered interest from shareholders from April 1, 1931, the date fixed for payment in the notice. *Abell* v. *Anderson* (6th Cir., 1945), 148 F. (2d) 372.

That the Receiver's notice was a "demand" for payment, see *supra*, p. 3.

**(c) The Insolvency Occurred in Kentucky Where the Bank Was Domiciled and Transacted All Its Business.**

Non-payment of the assessment at the time and place fixed for its payment was the last of the operative facts that gave rise to this cause of action. The operative facts that preceded it were the insolvency and liquidation of the bank, which "transformed the potential liability into one presently enforcible." These facts, too, occurred in Kentucky where the entire business of the Bank was conducted.

The assessment was on the stock of The National Bank of Kentucky. Its organization certificate designated Louisville, Kentucky, as the place where its operations were to be carried on (R. 26). By express provision of the National Bank Act, it was prohibited from transacting business in any other place. 12 U. S. C., Sec. 22. *First National Bank* v. *Missouri*, 263 U. S. 640 at 657. The business of the National Bank of Kentucky was at all times actually carried on and transacted in Louisville, Kentucky, *and in no other place* (R. 26).

Although organized under federal law, a national bank is a highly localized institution. Not only is its business restricted to the city specified in the organization certificate, but its place of business may be changed only with the consent of the Comptroller, and then only in the same state. 12 U. S. C. Sec. 30. The requisite amount of capital with which a national bank may commence business is determined by the population of such city. 12 U. S. C. Sec. 51. Its list of shareholders, open to the inspection of all creditors, must be kept in the office where its business is transacted. 12 U. S. C. Sec. 62. Three-fourths of its direc-

tors must reside in the state where it is located and must continue to reside there. 12 U. S. C. Sec. 72. It may consolidate only with such other national or state banks as are located within the same state. 12 U. S. C. Secs. 33, 34(a). A national bank may, under certain circumstances, operate branches but such branches must be within the state where the national bank is located. 12 U. S. C. Sec. 36.

Consequently, it has been frequently held that a national bank is a resident of and is domiciled in the state where it is located.

*In re Standard Oak Veneer Co.* (D. C. Tenn., 1909), 173 Fed. 103;
*Schmitt* v. *Tobin* (D. C. Nev., 1935), 15 F. Supp. 35.

Significantly the very first allegation of the complaint is that the National Bank of Kentucky is:

"... *domiciled* at Louisville, Jefferson County, in the Western District of Kentucky" (R. 1).

By an express statutory provision a national bank is, for jurisdictional purposes, a "citizen" of the state in which it is located. 28 U. S. C. Sec. 41 (16). It may be sued only in the district in the state where it is located. 12 U. S. C. Sec. 94; *Leonardi* v. *Chase National Bank* (2d Cir., 1936), 81 Fed. (2d) 19, certiorari denied, 298 U. S. 677.

In *Hunter* v. *The Niagara Fire Insurance Company*, 73 O. S. 110 (1905), an Ohio resident brought suit in Ohio against a New York insurance company on a fire insurance policy covering plaintiff's property located in Florida, which had been destroyed by fire. The action was barred by the Florida statute of limitations, but not by the Ohio statute. Section 4990 of the Revised Statutes of Ohio

(superseded by Section 11234 of the General Code) provided,

> "If, by the laws of the state or country where the cause of action arose, the action is barred, it is also barred in this state."

The court held that the cause of action arose in Florida, where the fire occurred, and that, therefore, the action was barred.

There is a striking analogy between the *Hunter* case and the instant one. In the *Hunter* case the liability of the defendant was created by the contract of insurance; in this case the liability was created by a federal statute. In the *Hunter* case the liability ripened into a cause of action by reason of the fire in Florida and hence the cause of action was held to have arisen there. In this case the liability of the stockholders ripened into a cause of action by reason of the insolvency of the National Bank. Its insolvency occurred in Kentucky where the assessment was also payable. Hence, this cause of action arose in Kentucky.

Petitioner urges that ownership of stock is also one of the operative facts (Pet. Br. 10). But it is only ownership in stock of a national bank that has become insolvent that is material to the cause of action. Mere ownership of stock, unaccompanied by insolvency of the bank and failure to pay an assessment, obviously cannot give rise to a cause of action.

## DISCUSSION OF THE THIRD CIRCUIT DECISION

Although the decision of the Court of Appeals for the Third Circuit in *Anderson* v. *Andrews*, 156 F. (2d) 972 (*sub nom. Cope* v. *Anderson*, No. 593, October Term, 1946) is distinguishable from the instant case, as set forth in our

brief in opposition to petition for certiorari (pp. 7-8), nevertheless, we respectfully submit that the *Andrews* case was incorrectly decided.

The Third Circuit decision is based on two grounds. The first is that Kentucky was not the place of payment because

> "The recipient of the payment was really not the Receiver but the Comptroller General of the United States, who, obviously, is not located in Kentucky."

It is clear, however, that the ultimate disposition of the proceeds of any recovery by the plaintiff in an action has no bearing on where the cause of action arises. Suppose, for example, the Receiver held a past due note of the defendants payable at Louisville, Kentucky. By force of statute the Receiver would be required to remit to the Comptroller any amounts collected by him on the note (12 U. S. C. Sec. 192); yet no one would contend that the cause of action did not arise in Kentucky. If the court's theory (which finds no support in any decided case) were correct, then every cause of action held by a receiver or fiduciary would not arise where the operative facts occur but at the place or places where the ultimate recipients of a possible recovery might reside, even though they were not parties to the action. Obviously this is not sound law.

Moreover, the Comptroller, though he determines the necessity for the assessment, is not empowered to bring a suit to enforce it. The Receiver is the only party who has authority to collect the assessment or to "enforce the personal liability of the shareholders" by suit. 12 U. S. C. §§ 191, 192.

The second and "wider" ground of the Third Circuit decision is not clear. After referring to *Holmberg, et al. v. Armbrecht, et al.*, 327 U. S. 392 as an "approach" to the problem, the opinion states:

"Ordinary state rules of law are not applicable to create or to limit the claim. We think, therefore, that this is not the kind of cause of action which is properly described as arising within the State of Kentucky. It did not arise there any more than it did in any other one of the states of the United States."

If by this the Court means that the local law of limitations is not applicable to the action, the decision is clearly incorrect. The rule is firmly established that actions against national bank stockholders for double liability are governed by state statutes of limitations. See cases cited, *supra*, page 4. In fact, an earlier portion of the opinion states that the "local law of limitations . . . . is applicable" [156 F. (2d) at 973].

If, on the other hand, the Court means that the cause of action did not arise in Kentucky because the liability was not created by Kentucky law, the decision is even less sustainable. It does not follow that a cause of action does not arise in a state where the operative facts occurred merely because it is for the enforcement of a liability created by the law of another jurisdiction. Numerous cases establish the principle that in determining the place where a cause of action arises the law by which the liability was created is of no materiality. See *supra*, pages 13-14.

The Court's allusion to *Holmberg* v. *Armbrecht*, *supra*, does not clarify the opinion. The *Holmberg* case, which arose under the Federal Farm Loan Act (12 U. S. C. 812), involved only the preliminary question presented here—whether any state statute of limitations was applicable.[7] As

[7] In the *Holmberg* case, the Court held that an action to enforce the liability of Federal Land Bank shareholders was not subject to local limitations because such an action involves "not only a federally created right but a federal right for which the *sole* remedy is in equity." Unlike the National Bank Act, the Farm Loan Act makes no provision for an assessment by the Comptroller on which an action at law may be brought against a shareholder; but the liability under the latter Act is enforcible only by a creditor's suit in equity in which the court must determine the existence and extent of

to this there is no dispute in the instant case (Pet. Br. 4). The *Holmberg* case did not involve, as here, a case where the equitable jurisdiction was concurrent with that of law; nor a state borrowing act nor a question as to where a cause of action arises. Since the state statute of limitations admittedly governs this action, as both the Third and Sixth Circuits held, the *Holmberg* case has no application to the instant one.

For an adverse criticism of the Third Circuit opinion and approval of that of the Sixth Circuit, see, 60 Harvard Law Review 303.

## CONCLUSION

The assessment sought to be enforced in this case is on the stock of a national bank which was located and transacted all its business in Louisville, Kentucky. It was a distinctly local institution serving only the community in which it was authorized to do business. Its operations resulted in insolvency which necessitated this assessment. When the Receiver was appointed to liquidate the bank he properly established his office at Louisville, and when the assessment finally fell upon the stockholders, it was expressly made payable at the Receiver's office there. Everything that led up to this cause of action and every fact that constituted it occurred at Louisville, Kentucky. It was, therefore, at Louisville that the cause of action arose.

State Borrowing Acts such as Section 11234 are designed to prevent enforcement of claims that have become outlawed in the state where the cause of action arose. The

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insolvency and the amount of shareholder's liability. Because of this "divergence between the procedure for recovery of assessments from shareholders in national banks, and that for enforcing the liability of shareholders in a federal land bank" state statutes of limitations are applicable in the Federal courts to national bank assessment actions but not to suits arising under the Federal Farm Loan Act. See, *Russell* v. *Todd*, 309 U. S. 280, 285-287, 290-295.

statute serves precisely that purpose in the instant case. The Receiver filed suit against Kentucky shareholders in Kentucky, where the bank was located and many stockholders resided, in February, 1936, almost a year before the instant suit was commenced. It was only in December, 1936, after the claim had become stale in Kentucky, that the Receiver attempted to sue Ohio residents. Section 11234 was enacted for the purpose of protecting Ohio residents from just such harassment on outlawed claims.

For the foregoing reasons, the judgment of the Sixth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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